91-1202

FILED
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No. ____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

Ann Richards, Governor of Texas; Selden Hale, III, Mamie Moore Proctor, Hon. Clarence N. Stevenson, Allan B. Polunsky, James M. Eller, F. L. Stephens, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

*Petitioners*

v.

John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

*Respondents*

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

*Respondents*

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

# PETITION FOR WRIT OF CERTIORARI
Appendices S-AA

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## APPENDIX S

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| LAWRENCE R. ALBERTI, et al., Plaintiffs, | § | |
| v. | § | |
| SHERIFF OF HARRIS COUNTY, TEXAS, et al., Defendants, and Third-Plaintiffs, | § | Civil Action No. 72-H-1094 |
| v. | § | |
| WILLIAM P. CLEMENTS, et al., Third-Party Defendants. | § | |

MEMORANDUM OPINION

I write separately to clarify my relationship to the relief set forth in the order entered contemporaneously herewith by the Hon. James DeAnda, Chief Judge of the United States District Court for the Southern District of Texas, as the sitting judge in Lawrence R. Alberti, et al. v. the Sheriff of Harris County, Texas, et al., civil action No. 72-H-1094, with which I have only one point of disagreement.

My connection with the Alberti litigation arises from my position as sitting judge in Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex. 1980), aff'd in part and vacated in part, 679 F.2d 1115, amended in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). After the Governor of the State

of Texas, the Director of the Texas Department of Corrections, the members of the Texas Board of Corrections, and the State of Texas were made third-party defendants in the Alberti action, the Court of Appeals for the Fifth Circuit directed the transfer to the Ruiz court of "so much of the relief portion of the third-party complaint [in Alberti] as seeks an injunction ordering [the state defendants] to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities." In re Clements, 881 F.2d 145, 154 (5th Cir. 1989) (emphasis in original).

While the relief Judge DeAnda now orders clearly is within the scope of Alberti, one aspect of the order seemingly falls within the category of matters within the purview of the Ruiz court. After directing the transfer to other county detention facilities of some of Harris County's overflow inmates who have been sentenced to the Texas Department of Criminal Justice - Institutional Division, Judge DeAnda directs that "[t]he State defendants shall deposit in the Registry of the Alberti court $750,000.00 by March 20, 1991, from which the County defendants shall be authorized to pay $40.00 per diem for each transferred inmate." I have not been directed to any portion of the evidence in Alberti which relates to whether or how an order requiring the State to pay $750,000.00 into the court registry will affect the State's ability to comply with the orders entered in Ruiz. Without an appropriate record in that respect, I cannot agree to that specific part of the relief ordered.

I also would note that if the question whether Texas law requires the State to bear the costs of confining some of Harris County's overflow Institutional Division-ready inmates were placed before me, my understanding of principles of abstention would lead me to refrain from ruling on it. The issue underlying the cost question is the relative responsibilities of the state and the counties for Institutional Division-ready detainees. The matter plainly is one of substantial public concern. Furthermore, developments in the law of Texas relating to the issue indicate that the question is an unsettled one.

First of these developments is Tex.Rev.Civ.Stat.Ann. art. 6166a-4 (Vernon 1991), which became effective March 20, 1990, and which directs the Texas Board of Criminal Justice to establish a formula for allocating the number of inmates that each Texas county can transfer to the Institutional Division each week. The statute requires the Board to consider factors which "shall include but are not limited to:"

(1) the percentage of prison admissions for the entire state that were used by the county or counties in the preceding 12 months;

(2) the percentage of the state's violent index crime that occurred in the county or counties in the preceding 12 months;

(3) the percentage of the state's total index crime that occurred in the county or counties in the preceding 12 months;

(4) the percentage of the state's total arrests under the Texas Controlled Substances Act that occurred in the county or counties in the 12 preceding months;

(5) the percentage of the state's population residing in the county or counties; and

(6) the percentage of the state's total unemployment in the county or counties.

Tex.Rev.Civ.Stat.Ann. art. 6166a-4(a).

The statute directs the Board to consider waiving the allocation formula for a county "(1) that experiences a rapid increase in persons convicted of felonies for reasons other than traditional sentencing practices in the county; or (2) in which the jail inmate population exceeds the approved capacity of the county's jail facility, as established by the Commission on Jail

Standards." Tex.Rev.Civ.Stat.Ann. art. 6166a-4(c). Such modifications of the allocation formula are prohibited, however, after November 30, 1990. Tex.Rev.Civ.Stat.Ann. art. 6166a-4(e).

It seems plain that in setting a limit on the number of prisoners each county can transfer to the Institutional Division, the Texas legislature intended that the county remain responsible for detaining those inmates it cannot transfer because it has filled its weekly allocation. To make the state responsible for Institutional Division-ready detainees in excess of a county's allocation would render the allocation process meaningless. Similarly, in the present action, to require the state to pay the cost of detaining Harris County's excess Institutional Division-ready inmates in other county detention facilities would appear to effectively override the allocation the Board of Criminal Justice has established for Harris County in accordance with the statute.

The second development pertinent to the issue at hand, of which I take judicial notice, is the decision in County of Nueces, Texas v. Texas Board of Corrections, et al., No. 452,071 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas) (Hart, J.). Construing Texas law before the enactment of art. 6166a-4, the court held that the state has a duty to reimburse counties for the costs incurred by detaining inmates who are ready for transfer to the Institutional Division. See partial summary judgments, filed April 18, 1989, and September 9, 1989. In a subsequent ruling, Judge Hart held that the enactment of art. 6166a-4 did not affect his holding in the case. See judgment, filed August 22, 1990. The court's decision currently is on appeal before the Third Judicial District Court of Appeals at Austin. Though not a party to the Nueces action, Harris County has filed an action in the same court seeking the same relief ordered in Nueces. Harris County v. State of Texas, et al., No. 475,468 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas).

The third matter of importance for the question presented here, of which I also take judicial notice, is the introduction into the Texas House of Representatives of House Bill 13, filed November 12, 1990, which would require the state to reimburse counties for the costs a county incurs by confining inmates who have been sentenced to the Institutional Division. Counties would be repaid not only such costs as they are incurred in the future, but also the amounts expended from September 1, 1989, until the date the act becomes effective. Thus, if enacted in its present form, the Bill would require the state to reimburse Harris County for the costs at issue here.

Perhaps the most important consequence of the introduction of House Bill 13 is that the question presented here will be resolved in the very place it should be decided, the Texas legislature. Its introduction also adds support to the conclusion that Texas law does not at present require the state to pay the cost of detaining a county's Institutional Division-ready prisoners. At the very least, the state's duty to pay such costs is not a settled matter of Texas law.

These three developments, taken together with other considerations, suggest that the proper course for this court is to abstain from deciding whether Texas law requires the state to reimburse Harris County for costs incurred in confining Institutional Division-ready inmates at other county detention facilities. New Orleans Public Serv. v. Council of New Orleans, 109 S.Ct. 2506 (1989), contains recent teaching from the Supreme Court concerning the circumstances in which abstention is proper. After discussing the Court's decisions in Burford v. Sun Oil Co., 319 U.S. 315 (1943) and Alabama Pub. Serv. Comm'n v. Southern R. Co., 341 U.S. 341 (1951), Justice Scalia, writing for seven members of the court, stated:

> From these cases, and others on which they relied, we have distilled the principle now commonly referred to as the "Burford doctrine." Where timely and adequate state review is available, a federal court sitting

> in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar;' or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' Colorado River Water Conservation Dist. v. United States, 424 U.S 800, 814 (1976).

109 U.S. at 2514.

The question presented here falls squarely into the first category in which the New Orleans Court would find Burford-type abstention proper. To require the state to pay the cost of detaining Harris County's excess Institutional Division-ready inmates would "interfere with the proceedings or orders" of the Texas Board of Criminal Justice in establishing Harris County's allocation of transfers to the Institutional Division, in accordance with art. 6166a-4. The issue presents a difficult question of Texas law, and certainly is one that bears on a policy problem of substantial public import whose importance transcends the result in the case at bar, as to the legal point in contention here. The policy problem underlying the cost question presented here is the relative responsibilities of the Institutional Division and the counties for detention of Institutional Division-ready inmates in excess of each county's allocation. While the issue whether the state or Harris County should bear the costs of alternative detention for overflow Harris County prisoners obviously is significant, it is less

important than the underlying policy problem, which has state-wide ramifications.[1]

In several cases, the Supreme Court has endorsed or ordered abstention by the federal district court upon facts similar to those presented here. Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593 (1968), involved claims concerning water use which turned on the meaning of "public use" under the New Mexico Constitution. The district court decided the claims, and the Court of Appeals rejected a motion to stay the federal court's action until the state law issues could be settled in a declaratory judgment suit then pending in state court. 391 U.S. at 593-94. The Supreme Court reversed, stating:

> The Court of Appeals erred in refusing to stay its hand. The state law issues which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources. The issue, moreover, is a truly novel one. The question will eventually have to be resolved by the New Mexico courts, and since a declaratory judgment action is actually pending there, in all likelihood that resolution will be forthcoming soon. Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource.

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[1] The second category of Burford-type abstention to which the New Orleans opinion refers is that where repeated decisions by the lower federal courts concerning a subject matter of public concern would frustrate state efforts to establish a coherent policy with regard to that matter. See Burford v. Sun Oil. Co., supra, 319 U.S. at 326-31. The present action does not precisely fit this category, because actions like the one at bar are not likely to frequently recur. On the other hand, rendering a decision here likely would cause the same type of harm the Burford Court sought to avoid, that is, it would disrupt the state's efforts to establish a coherent, state-wide policy concerning the relationship between the Institutional Division and the county jails.

391 U.S. at 594.

In Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), as in the case at bar, conflicting indications concerning a question of state law rendered the federal district court unable to determine with confidence how the highest court of the state would decide the issue before it. 360 U.S. at 30. Because the matter, involving the law of eminent domain, was one of substantial public concern, the Court upheld the district court's decision to abstain from deciding the case until the state supreme court had had an opportunity to rule on the question. 360 U.S. at 28-31. In explaining its decision, the Court noted:

> [W]e have held that the mere difficulty of state law does not justify a federal court's relinquishment of jurisdiction in favor of a state court action. Meredith v. Winter Haven, 320 U.S. 228, 236. But where the action touched upon the relationship of City to State, Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, . . . we have required District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination.

360 U.S. at 27-28.

In Fieldcrest Dairies, to which the Thibodaux Court refers, a company that marketed milk in the city of Chicago applied for a permit to sell milk in paper containers. Because a city ordinance required milk sold in quantities less than one gallon be delivered in standard milk bottles, the city board of health refused to grant the permit. The company brought an action in the federal district court, seeking a declaratory judgment that the ordinance did not prohibit the sale of milk in paper containers, or, in the alternative, that such a prohibition would be unconstitutional and invalid. During the pendency of the action, the Illinois legislature enacted the statute regulating

the sale of milk, which arguably conflicted with the Chicago city ordinance. 316 U.S. at 169-70.

While the district court and the court of appeals decided the case on the merits, the Supreme Court reversed, holding that the lower courts should have abstained from adjudicating the case. Noting that the Illinois courts and legislature would have the final say as to the meaning of the ordinance in question and as to the alleged conflict between the ordinance and the statute, the Court stated, "The determination which the District Court, the Circuit Court of Appeals, or we, might make could not be anything more than a forecast -- a prediction as to the ultimate decision of the Supreme Court of Illinois." Because the law in question was unsettled, and because "the dispute in its broad reach involves a question as to whether a city has trespassed on the domain of a State," the Court found that

> [t]he delicacy of that issue and an appropriate regard 'for the rightful independence of state governments' re-emphasize that it is a wise and permissible policy for the federal chancellor to stay his hand in absence of an authoritative and controlling determination by the state tribunals. As we said in the Pullman case, 'The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision' and any 'needless friction with state policies.'

316 U.S. at 172 (citations omitted).

The same concerns counsel abstention here.

As noted above, Harris County has instituted in the Travis County district court an action seeking relief which would include recovery of the costs at issue here. Harris County v. State of Texas, et al., No. 475,468 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas). It is well established that the pendency of a parallel state court action does not in itself require the federal court to abstain. See, e.g., Moore v. Sims,

442 U.S. 415, 423 n.8 (1979). But the prosecution of that action ensures that Harris County will have "timely and adequate state court review" of the cost issue in question here. See New Orleans Public Serv. v. Council of New Orleans, supra, 109 S.Ct. at 2514. Similarly, the introduction of House Bill 13 does not require abstention, but the fact that the Texas legislature apparently will address the question now at bar increases the desirability of abstention by a federal court from deciding the issue.

Both in practical terms and under the provisions of art. 6166a-4, Institutional Division-ready detainees in excess of a county's weekly allocation of transfers to the Institutional Division remain in custody of the county. I am cognizant, then, that to abstain from deciding the cost issue presented here would require, for the present, that Harris County continue to bear the expense of confining those inmates it cannot transfer to the Institutional Division, including any such prisoner the Alberti court orders the County to transfer to other county detention facilities. I would not now hold that Texas law imposes no duty on the state to pay the costs a county incurs in detaining Institutional Division-ready prisoners in excess of a county's weekly allocation. Rather, because I believe that the matter poses a "difficult question[] of state law bearing on policy problems whose importance transcends the result in the case at bar," New Orleans Public Serv. v. Council of New Orleans, supra, 109 S.Ct. at 2514, I would abstain from deciding the issue.

SIGNED this 7th day of February, 1991.

William Wayne Justice
United States District Judge

## APPENDIX T

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| LAWRENCE R. ALBERTI; ET AL., Plaintiffs, | § | |
| VS. | § | CIVIL ACTION |
| | § | NO. H-72-1094 |
| THE SHERIFF OF HARRIS COUNTY, TEXAS; ET AL., | § | |
| Defendants and Third-Party Plaintiffs, | § | |
| VS. | § | |
| WILLIAM P. CLEMENTS, JR.; ET AL., | § | |
| Third-Party Defendants. | § | |

ORDER

On October 24, 1990, the Court directed the parties to meet with the Special Masters in the Alberti and Ruiz cases to develop jointly an acceptable plan for dealing with the current population problem in Harris County detention facilities. This requirement followed motions on the part of both State and County defendants to stay the effect of the Court's September 7, 1990 Order mandating awards of accelerated good time to some convicted felons if the number of prisoners ready for transfer to the Texas Department of Criminal Justice-Institutional Division (Institutional Division) in Harris County detention facilities exceeded 1,350 and release

of some County prisoners in certain defined categories if the population of County prisoners exceeded 4,750.

On November 7, 1990, representatives of State and County agencies and courts with key roles in determining population levels in Harris County detention facilities met with the Special Masters to explore methods of addressing the steady expansion in the number of felons ready for transfer to the Institutional Division.

Participants at that meeting were able to identify a nu;mber of programs, some just implemented, some already in the process of development, and other identified and agreed to for the first time. All are designed to ease overcrowding, and most are designated for convicted felons. It is anticipated that many of the measures discussed can be developed and implemented between November 1 and December 31, 1990, as follows:

1. Expansion of intensive and superintensive supervision probation caseloads: 450 new units to be created by December 31, 1990;

2. Initiation of a contract for drug treatment beds: 50 new beds, available as of November 1, 1990;

3. Expansion of electronic monitoring units for home confinement: 100 new units by December 31, 1990;

4. Dedication of a State-operated boot camp: 200 additional beds, as of December 31, 1990;

5. Possible expansion of electronic monitoring units to be shared by State parole and County probation: 200 new units by December 31, 1990;

6. Reduction of population of Class C misdemeanants: a reduction of 35 misdemeanants by December 31, 1990.

These programs, all at various stages of formation, development and implementation, should provide a total of 1,035 additional sentencing options for district and county judges in Harris County. It is anticipated that the bulk of these options will be introduced into the current sentencing stream primarily as alternatives to the incarceration of felons, an approach that promises to maximize use of the new options as genuine alternatives to TDCJ incarceration.

In addition, the population of Harris County detention facilities is generally lower at year's end, a projected decrease of about 150 inmates this year. It is anticipated that these factors will result in an overall population reduction of 1,185 prisoners by December 31, 1990. This will reduce the current backlog of felons and allow, at the same time, for some limited growth in the felon population due to the continuing and troubling weekly excess of commitments over removals. It will take genuinely cooperative and dedicated efforts on the part of State and County officials to implement all of these programs, however, and their impact on the number of felons committed by Harris County courts to the Institutional Division cannot be predicted with total assurance. Nevertheless, the good faith and creative energy the participants displayed at the November 7, 1990 meeting, as reported to the Court by the Special Masters, augers well for the future.

In addition to the programs already catalogued above, the participants at the November 7, 1990 meeting were able to identify another 1,000 beds or alternative sentencing units scheduled to become available between January 1 and April 30, 1991, including a County-operated boot camp for 385 offenders, 150 additional State-operated intermediate sanction beds, a 190-bed residential treatment facility for probationers,

and 275 additional intensive and superintensive probation supervision slots.

If all of these proposed and developing programs can be implemented and used as genuine alternatives to incarceration, principally of felons in the Institutional Division, the County and State defendants could meet, for the present, the caps imposed by the Court in the September 7, 1990 Order without recourse to the release provisions included in that Order. The Special Masters have recommended that the County and State defendants be given a limited period of time to develop these and possibly other alternative options for reducing the population of Harris County detention facilities to the limits contained in the September 7, 1990 Order. It is therefore,

ORDERED that the County and State defendants be given 60 days from the entry of this Order to implement the programs described above, or others, in order to meet the population caps incorporated in the September 7, 1990 Order. Immediately following that 60 day period, the Alberti Special Master shall report to the Court on the impact of those programs. If the expansion of alternative sentencing options or any other program developed by the County and State defendants does not serve to reduce the population to the mandated levels, the defendants, or either of them, shall be required to contract for the use of private jail cells or empty county jail cells around the State to house excess prisoners.

The Special Masters are directed to continue to work with the defendants to oversee the development of their plans and to assess the actual impact on population of the programs developed to date.

SIGNED this 19th day of November, 1990, at Houston, Texas.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

## APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| LAWRENCE R. ALBERTI, et al.,) | | |
| Plaintiffs, | ) | |
| vs. | ) | |
| JOHNNY KLEVENHAGEN, et al., | ) | C. A. |
| | ) | No. 72-H-1094 |
| Defendants. | ) | |
| vs. | ) | |
| WILLIAM P. CLEMENTS, et al., | ) | |
| Third-Party Defendants. | ) | |

ORDER

On April 5, 1990, the Court entered a remedial order in this case that established an immediate cap of 6,700 inmates at the Harris County detention facilities, and caps of 6,400 by May 15, 1990, and 6,100 by August 31, 1990. That order imposed an obligation on the State defendants to take a specific number of prisoners ready for transfer to the Texas Department of Criminal Justice - Institutional Division (TDCJ-ID) and provided that if the State defendants failed to take that number of prisoners, automatic awards of administrative good time would be made to certain carefully limited classes of convicted felons. Likewise, the order provided for releases of certain categories of convicted misdemeanants and pre-trial detainees, commencing with those least likely to present a threat to the public

safety, in the event that the mandated steps by the County defendants failed to reduce the number of prisoners to levels specified in the order.

As a consequence of that order, the number of prisoners held in Harris County detention facilities was substantially reduced, without the necessity of making any awards of administrative good time. On August 13, 1990, the total population of Harris County detention facilities was 6,097, or 30 percent over their design capacity. The number of felons ready for transfer to TDCJ-ID fell from 3,420 on July 31, 1989 to 1,069 on July 31, 1990. The total smaller population, moreover, occupied increased cellspace, because the newly renovated 301 Building opened on December 2, 1989, raising the capacity of Harris County detention facilities by 417 to a new total of 4,698 beds.

On August 14 and 15, 1990, the Court held hearings to review the defendants' progress in meeting the requirements of the April 5, 1990 Order and consider whether and what further remedial actions might be appropriate. The County defendants informed the court that its latest construction project, the so-called 701 Building, a cold storage warehouse in downtown Houston currently being converted into a 4,000-bed jail, and a new central intake center for the processing of all prisoners on entry into Harris County Sheriff's Department, will be ready for occupancy by September 1, 1991. This date is critical in this case because these new facilities will permit the County to handle up to 8,698 prisoners, which, in combination with programs for alternatives to incarceration being developed under House Bill 2335, portends an end to the correctional crisis that has plagued Harris County for over 15 years.

The problem the court must address now is how best to bridge the next 12 months. The Special Master in the Alberti case testified that, while some further population reductions are necessary, the County's institutions could probably be managed safely and securely for a limited period at a population level somewhere between 5,500 and 6,000. The State defendants'

expert witness concurred. The task then is to assure first that the September 1991 target date for the opening of the 701 Building is fixed firmly and irrevocably and, second, to keep the population of Harris County detention facilities within acceptable limits for the next 12 months. Accordingly, the following remedial measures are hereby ordered and directed:

1. The County defendants shall occupy the new 701 Building by no later than September 1, 1991. They shall provide funding for, and begin, the recruitment, hiring and training of staff to operate the 701 Building by no later than September 30, 1990. The County defendants shall be assessed a substantial daily fine for each day beyond September 1, 1991 they fail to occupy the 701 Building. "Occupy" in this context refers to the housing of a substantial number of prisoners, not a token contingent.

2. Upon the entry of this order, the overall population of Harris County detention facilities shall not exceed 6,100 prisoners.

3. The overall population of Harris County detention facilities shall be reduced to 6,000 by December 31, 1990.

4. The population of prisoners ready for transfer from Harris County detention facilities to TDCJ-ID shall not exceed 1,350 between the entry of this order and September 1, 1991. For the purpose of this order, a prisoner ready for transfer to TDCJ-ID is an individual who has been convicted of a felony and sentenced, and whose immediate transfer to TDCJ-ID would be in compliance with section 8 of article 42.09 of the Texas Code of Criminal Procedure.

5. Between the date of the entry of this order and September 1, 1991, the State defendants shall maintain the current allocation formula for admissions to TDCJ-ID pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4. That proportional share

of admissions to TDCJ-ID shall apply to all additional capacity that becomes available during the period covered by this order.

6. The County defendants shall compile and submit to the State defendants every ten days a list of prisoners potentially eligible for parole in absentia (PIA) or pre-parole transfer (PPT) together with the necessary paperwork on each identified prisoner. The County defendants shall be responsible for forwarding the necessary paperwork on eligible prisoners within ten days of their receipt of the requisite paperwork from courts or prosecutors. The State defendants shall take final action on parole within 45 days of receiving notification from all personnel that a prisoner is eligible, together with the receipt of all necessary paperwork. The period of time consumed by the "Notice to Trial Officials" procedures shall not be included in this 45-day time limit. The State defendants shall be required to take final action on prisoners eligible for PPT within 45 days subject to the availability of PPT beds.

7. Whenever the number of prisoners in Harris County detention facilities ready for transfer to TDCJ-ID exceeds 1,350 for 15 consecutive days, awards of administrative good time pursuant to this order shall be made only to those prisoners in Harris County detention facilities ready for transfer TDCJ-ID who have already been identified as eligible for consideration for either PIA or PPT, and whose names and paperwork have been submitted by the County defendants, other than the following: (1) prisoners who are serving a sentence for an offense for which the judgment contains an affirmative finding under Subdivision (2) of Subsection (a) of section 3g, article 42.12, Texas Code of Criminal Procedure; (2) prisoners who are serving a sentence for an offense listed in one of the following sections of the Texas Penal Code: (A) section 19.02 (murder); (B) section 19.03 (capital murder); (C) section 19.04 (voluntary manslaughter); (D) section 20.03 (kidnapping); (E) section 20.04 (aggravated kidnapping); (F) section 21.11 (indecency with a child); (G) section 22.011 (sexual assault); (H) section 22.021 (aggravated sexual assault); (I) section 22.03 (deadly

assault on law enforcement or corrections officer or court participant); (J) section 22.04 (injury to child or an elderly individual); (K) section 25.02 (incest); (L) section 25.06 (solicitation of a child); (M) section 25.11 (sale or purchase of a child); (N) section 28.02 (arson); (O) section 29.02 (robbery); (P) section 29.03 (aggravated robbery); (Q) section 30.02 (burglary), if the offense is punished as a first degree felony under that section; (R) section 43.04 (aggravated promotion of prostitution); (S) section 43.05 (compelling prostitution); (T) section 43.24 (sale, distribution, or display of harmful material to minor); (U) section 43.25 (sexual performance by a child); (V) section 46.11 (deadly weapon in penal institution); (W) section 15.01 (criminal attempt), if the offense attempted is listed in this paragraph; (X) section 15.02 (criminal conspiracy), if the offense that is the subject of this conspiracy is listed in this paragraph; or (Y) section 15.03 (criminal solicitation), if the offense solicited is listed in this paragraph; and (3) prisoners who are serving a sentencing for an offense listed in section 4.03(c) or 4.032(c) (aggravated manufacture or delivery of a controlled substance), section 4.04(c), 4.041(c), 4.042(c), or 4.043(c) (aggravated possession of a controlled substance), section 4.05 (delivery of marijuana) if the offense is punished under Subsection (b)(5) of that section, section 4.05(c) (aggravated delivery of marijuana), or section 4.051(c) (aggravated possession of marijuana) of the Texas Controlled Substance Act (article 4476-15, Vernon's Texas Civil Statutes).

In the event that awards of administrative good time are required to achieve the limit on the number of prisoners ready for transfer to TDCJ-ID in Harris County detention facilities, sufficient administrative good time shall be awarded to eligible prisoners to reduce the number of such prisoners to 1,350 within a reasonable time. If the initial award of administrative good time does not suffice to reduce the number of prisoners awaiting transfer to TDCJ-ID to 1,350 within a reasonable time, additional increments of administrative good time shall continue to be awarded to all eligible prisoners until the required cap has been reached. The Alberti Special Master shall apprise

the court if awards of administrative good time are required by this paragraph and shall recommend the number of days to be awarded. Any awards shall be ordered by the Alberti court. The State and County defendants shall cooperate to develop an orderly process for the identification of prisoners eligible for additional good time and provide that information to the Special Master. The State and County defendants shall not be in contempt of this order if, despite compliance with all aspects of this order, the acceleration of administrative good time as directed in this paragraph fails to achieve the required cap.

8. The population of prisoners in Harris County detention facilities, exclusive of those ready for transfer to TDCJ-ID, shall not exceed 4,750 between the entry of this order and December 31, 1990, or 4,650 between January 1 and September 1, 1991.

9. The County defendants may utilize expanded use of release on recognizance and their pre-trial services agency, extensive use of electronic monitoring and drug testing programs for pre-trial detainees, or the implementation of alternative community corrections programs pursuant to the provisions of House Bill 2335 to remove county prisoners from Harris County detention facilities and ameliorate overcrowded conditions.

10. Whenever the population of Harris County detention facilities, exclusive of prisoners ready for transfer to TDCJ-ID, exceeds 4,750 between the entry of this order and December 31, 1990 or 4,650 between January 1 and September 1, 1991 for 15 consecutive days, the Alberti Special Master shall make sufficient releases to meet the then-applicable cap. In making releases, the Special Master shall operate, first, to reduce any potentialy adverse impact of such releases on public safety and, second, to maximize the impact of releases on actual population reductions. Releases shall be made in order of those least likely to create danger to the community in the opinion of the Special Master, and choices among the categories of those

released will be based on the impact of projected releases on the actual population. Among the categories of County prisoners the Special Master shall consider for release are misdemeanant pre-trial detainees who are not charged with a felony; pre-trial detainees charged with a third degree felony who have scored six or seven points on their pre-trial services interview and are not charged with another felony; Class C misdemeanants held in lieu of the payment of court costs/fines; Class A and B misdemeanants serving court costs/fines; and parole violators arrested on a so-called "Blue Warrant" for the technical violation of parole conditions rather than a new criminal charge. In addition, if necessary to meet the cap, the Special Master may award sufficient increments of daily good time to convicted Class A and B misdemeanants to accomplish the needed releases. The County defendants shall cooperate fully with the Special Master in the conduct of all such releases and provide whatever logistical support he may need to carry out his duties pursuant to this provision. The County defendants shall not be in contempt of this order if, despite compliance with all aspects of this order, through the releases and acceleration of good time directed in this paragraph, the caps required by this order are not achieved.

11. The State and County defendants shall cooperate to implement as quickly as possible a plan, pursuant to the provisions of House Bill 2335, designed to reduce the population of the Harris County detention facilities in order to minimize the need for awards of good time and early releases of prisoners. To this end, all provisions of paragraph 6 of the court's order of April 5, 1990 shall continue in full force and effect.

12. Based on information to be provided by the Alberti Special Master, the court will review on a quarterly basis the actions taken pursuant to this order and the impact of those actions on the level of population in the Harris County detention facilities to determine whether this order is having its intended effect and whether any modification is required.

13. The court specifically retains jurisdiction over this matter.

Done in Houston, Texas this 6th day of September, 1990.

James DeAnda
Chief Judge
United States District Court
Southern District of Texas

William Wayne Justice
United States District Judge
United States District Court
Eastern District of Texas
Sitting by Designation

## APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| LAWRENCE R. ALBERTI, et al., | ) | |
| Plaintiffs, | ) | |
| v. | ) | |
| THE SHERIFF OF HARRIS COUNTY, et al., | ) | |
| Defendants/Third-Party Plaintiffs, | ) | C. A. No. 72-H-1094 |
| v. | ) | |
| WILLIAM P. CLEMENTS, et al., | ) | |
| Third-Party Defendants. | ) | |

ORDER

On September 25, 1989, the court entered Findings of Fact and Conclusions of Law relating to the unconstitutionality of conditions in Harris County detention facilities and the liability of the State and Count defendants for such conditions. After lengthy negotiations among the parties over proposed remedies for dealing with overcrowding and unconstitutional conditions, the subsequent submission by the parties of remedial plans and a lengthy hearing on the propose remedial plans conducted before the undersigned judges, a remedial

order was entered on March 15, 1990. Since that date, the parties have filed motions that have brought to our attention the need to clarify certain provisions in that order and, in one minor respect, to modify the prior order. It should be emphasized that these clarifications and the minor modification in no manner depart from the intent of the court when it entered its March 15 order. In order to avoid misunderstanding, the order of March 15, 1990 will be vacated and this order will be entered in its place, nunc pro tunc. Accordingly, the following remedial measures are hereby ordered and directed:

1. Upon the entry of this order, the overall population of Harris County detention facilities shall not exceed 6,700 prisoners.

2. The overall population of Harris County detention facilities shall be reduced to 6,400 prisoners by May 15, 1990, and shall be reduced to 6,100 prisoners by August 31, 1990. These objectives shall be achieved by actions of the State defendants and the County defendants, as set forth below.

3. Between February 1, 1990 and August 31, 1990, the State defendants shall cause at least 9,130 prisoners ready for transfer from Harris County detention facilities to the Institutional Division of the Texas Department of Criminal Justice (formerly the Texas Department of Corrections, and referred to hereafter as "the Institutional Division"), as defined below, to be removed from the Harris County detention facilities.

4. For the purpose of this order, a prisoner ready for transfer to the Institutional Division is an individual who has been convicted of a felony and sentenced, and whose immediate transfer to the Institutional Division would be in compliance with section 8 of article 42.09 of the Texas Code of Criminal Procedure.

5. The County defendants shall compile and submit to the State defendants every ten days a list of prisoners potenti-

ally eligible for parole in absentia (PIA) or pre-parole transfer (PPT), together with the necessary paperwork on each identified prisoner. The County defendants shall be responsible for forwarding the necessary paperwork on eligible prisoners within ten days of their receipt of the requisite paperwork from the courts or prosecutors.

The State defendants shall take final action on parole within 45 days of receiving notification from all personnel that a prisoner is eligible, together with the receipt of all necessary paperwork. The period of time consumed by the "Notice to Trial Officials" procedures shall not be included in this 45-day time limit. The State defendants shall be required to take final action on prisoners eligible for PPT within 45 days, subject to the availability of PPT beds.

6. The County defendants have submitted a plan, pursuant to the provisions of House Bill 2335, portions of which propose alternative facilities and programs for convicted felons traditionally transferred to the Institutional Division who are, or will be, kept in Harris County. The County defendants' plan shall be reviewed expeditiously by appropriate State officials. If approved, the State defendants shall immediately take all steps that are necessary and within their authority to provide funding to the County for the implementation of the plan, through a request for budget executions or other means. The State defendants will not be obligated, however, to provide funding for such purpose in excess of the monetary limits established pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4, and in determining whether any advance of funds is required pursuant to a budget execution, the State defendants may take into account the ability of the County defendants to fulfill their obligations under the plan during the period for which any accelerated funding may be requested.

7. During the period covered by this order, the State defendants shall maintain the current allocation formula for admissions to the Institutional Division as adopted by the

Board of Criminal Justice on January 29, 1990 pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4. That proportional share of admissions to the Institutional Division shall remain constant with respect to both current Institutional Division facilities and such Institutional Division facilities as may come on line and be ready for occupancy by prisoners during the period covered by this order.

8. On May 31, 1990, the Sheriff of Harris County shall notify the court of the number of prisoners ready for transfer to the Institutional Division who were removed by the State defendants from the Harris County detention facilities between February 1 and May 31, 1990. On August 31, 1990, the Sheriff of Harris County shall notify the court of the number of prisoners ready for transfer to the Institutional Division who were removed by the State defendants from the Harris County detention facilities between June 1 and August 31. If the State defendants have not removed 4,565 prisoners from the Harris County detention facilities between February 1 and May 31, 1990, or a total of 9,130 prisoners from the Harris County detention facilities by August 31, 1990, awards of administrative good time pursuant to this order shall be made to prisoners in Harris County detention facilities ready for transfer to the Institutional Division who have been identified already as eligible for consideration for either PIA or PPT, and whose names and paperwork have been submitted by the County defendants, other than the following: (1) prisoners who are serving a sentence for an offense for which the judgment contains an affirmative finding under Subdivision (2) of Subsection (a) of section 3g, article 42.12, Texas Code of Criminal Procedure; (2) prisoners who are serving a sentence for an offense listed in one of the following sections of the Texas Penal Code: (A) section 19.02 (murder); (B) section 19.03 (capital murder); (C) section 19.04 (voluntary manslaughter); (D) section 20.03 (kidnapping); (E) section 20.04 (aggravated kidnapping); (F) section 21.11 (indecency with a child); (G) section 22.01 (sexual assault); (H) section 22.021 (aggravated sexual assault); (I) section 22.03 (deadly

assault on law enforcement or corrections officer or court participant); (J) section 22.04 (injury to child or an elderly individual); (K) section 25.02 (incest); (L) section 25.06 (sale or purchase of a child); (M) section 25.06 (solicitation of a child); (N) section 28.02 (arson); (O) section 29.02 (robbery); (P) section 29.03 (aggravated robbery); (Q) section 30.02 (burglary), if the offense is punished as a first degree felony under that section; (R) section 43.04 (aggravated promotion of prostitution); (S) section 40.05 (compelling prostitution); (T) section 40.24 (sale, distribution, or display of harmful material to minor); (U) section 43.25 (sexual performance by a child); (V) section 46.11 (deadly weapon in penal institution); (W) section 15.01 (criminal attempt), if the offense attempted is listed in this paragraph; (X) section 15.02 (criminal conspiracy), if the offense that is the subject of this conspiracy is listed in this paragraph; or (Y) section 15.30 (criminal solicitation), if the offense solicited is listed in this paragraph; and (3) prisoners who are serving a sentence for an offense listed in section 4.03(c) or 4.032(c) (aggravated manufacture or delivery of a controlled substance), section 4.04(c), 4.041(c), 4.042(c), or 4.043 (c) (aggravated possession of a controlled substance), section 4.05 (delivery of marijuana) if the offense is punished under Subsection (b)(5) of that section, section 4.05(c) (aggravated delivery of marijuana), or section 4.051(c) (aggravated possession of marijuana) of the Texas Controlled Substance Act (article 4476-15, Vernon's Texas Civil Statutes).

In the event that awards of extra administrative good time are required to achieve the removals required of the State defendants, 30 days of administrative good time shall be made to eligible prisoners. If the initial award of 30 days of administrative good time does not suffice to produce the required number of removals, 30-day increments of administrative good conduct time shall continue to be awarded to all eligible prisoners until the number of required removals has been accomplished. The State defendants shall not be in contempt of this order if, despite compliance with all aspects of this order, the acceleration of administrative good time as

directed in this paragraph fails to produce a sufficient number of prisoners eligible for release through PIA or PPT to accomplish the number of required removals. The Special Master in this case shall apprise the court if any awards of administrative good time are required by this paragraph, in which event such awards shall be ordered by the Alberti court upon recommendation of the Special Master. The State and County defendants shall cooperate to develop an orderly process for the identification of prisoners eligible for additional good time and provide that information to the Special Master.

9. Not later than ten days following the entry of this order, the Sheriff of Harris County shall file a report with the court setting forth the total number of inmates in Harris County detention facilities, who are not ready for transfer to the Institutional Division, as of the date of entry of this order. This number shall include pre-trial detainees, county prisoners, Class C misdemeanants, parole violators, bench-warrant prisoners, fugitives, civil district court detainees, federal prisoners, immigration prisoners, inmates convicted and sentenced to less than ten years whose cases are on appeal under authority of Tex. Code Crim. Pro Ann. art. §42.09, §4 and convicted and sentenced inmates with multiple indictments whose trials are not completed.

10. Commencing on the date of this order, the County defendants shall ensure that the population of inmates in Harris County detention facilities, who are not ready for transfer to the institutional Division, is maintained at a level that will permit the achievement of the objectives of paragraph 2 of this order. The County defendants may meet this obligation through a variety of self-initiated means, including, for example, an expedited, critical review of their present pre-trial detainee population, in conjunction with the County and State judiciary, to remove detainees determined to be eligible for release on personal bond; the introduction and use of the electronic monitoring and drug testing programs for pre-trial detainees; implementation of community corrections programs

pursuant to the provisions of House Bill 2335; or any other feasible and appropriate measures.

11. On May 31 and August 31, 1990, the Sheriff of Harris County shall notify the court of the total number of inmates in Harris County detention facilities. If, despite the adoption of the voluntary measures described in paragraph 10, above, the total number of inmates exceeds 6,400 on May 15 despite the State defendants' compliance with paragraphs 3, 5, and 8 of this order, or the total number of inmates exceeds 6,100 on August 31 despite the State defendants' compliance with paragraphs 3, 5, and 8 of this order, the Alberti Fact-Finding Master shall release misdemeanor pre-trial detainees, first releasing those charged with the lowest category of offense, provided that no misdemeanor detainee shall be released who is also charged with a felony. If the mandated population reduction requires the release of one or more pre-trial detainees charged with a particular category of offense, all of the eligible members in that category shall be released. If the release of misdemeanor pre-trial detainees does not suffice to produce the required reduction, the Fact-Finding Special Master shall next release pre-trial detainees charged with a third degree felony who score a six or seven on their pre-trial services interview, and who are not also charged with another felony offense. If the release of misdemeanor and third degree felony pre-trial detainees does not suffice to produce the required reduction in population, the Fact-Finding Special Master shall release Class C misdemeanants held in lieu of the payment of court costs/fines. Releases within this category shall be based on the amount of the costs/fines to be served, with those having the least costs/fines to serve being released first. If meeting the mandated reduction requires the release of one or more offenders in a particular category, all of the eligible members in that category shall be released. Thus if two releases are required to meet the quota, but there are six incarcerated misdemeanants serving only one day in lie of costs/fines, all six are to be released. If the release of Class C misdemeanants serving costs/fines does not suffice to produce the required reduction,

the Fact-Finding Special Master shall release Class A and B misdemeanants serving court costs/fines. Releases in this category, again, shall be based on the amount of the costs or fines to be served, with those having the least costs or fines being released first. If the release of Class C misdemeanants serving fines and Class A and B misdemeanants serving costs/fines does not suffice to produce the required reduction, the Fact-Finding Special Master shall award sufficient increments of daily administrative good time to Class A and B misdemeanants serving County time to accomplish the number of releases required. If more than the number of inmates needed to meet the required reduction are eligible for release based on the award of a specific amount of good time, all inmates made eligible by the award of good time shall be released. The Fact-Finding Special Master shall continue to award daily increments of administrative good time to prisoners serving County time and make releases in the order prescribed above until the number of inmates in Harris County detention facilities reaches the levels required by paragraph 2 of this order to be accomplished by May 15 and August 31. In directing the foregoing releases, the Fact-Finding Special Master shall operate with a view to reducing the potentially adverse impact of such releases on public safety; releases shall be made in order of those least likely to create a danger to the community in the opinion of the Special Master. The County defendants shall not be liable for proceedings in contempt of this order if, despite compliance with all aspects of this order, through the acceleration of good time and releases directed in this paragraph, an insufficient number of prisoners is identified and released to meet the reductions mandated by this order.

12. The court specifically retains jurisdiction over this matter.

IT IS HEREBY ORDERED that the court's order of March 15, 1990, be and hereby is vacated.

DONE in Houston, Texas this 5th day of April 1990, nunc pro tunc March 15, 1990.

James DeAnda
Chief Judge
United States District Court
Southern District of Texas

William Wayne Justice
United States District Judge
Eastern District of Texas
Sitting by Designation

**APPENDIX W**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| LAWRENCE R. ALBERTI; ET AL. | § | |
| | § | |
| VS. | § | CIVIL ACTION |
| | § | NO. H-72-1094 |
| THE SHERIFF OF HARRIS COUNTY, TEXAS; ET AL. | § | |
| | § | |
| VS. | § | |
| WILLIAM P. CLEMENTS; ET AL. | § | |

ORDER

The Court ORDERS that County Defendants' motion to amend or supplement the findings and conclusions entered September 25, 1989, or, in the alternative for a new trial is DENIED.

SIGNED in Houston, Texas, this 23rd day of October, 1989.

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JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

## APPENDIX X

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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|---|---|---|
| LAWRENCE R. ALBERTI; ET AL.. | § | |
| | § | |
| VS. | § | CIVIL ACTION |
| | § | NO. H-72-1094 |
| JOHNNY KLEVENHAGEN; ET AL. | § | |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This case presents a triad of pending matters aimed at vindicating the rights of inmates presently incarcerated in the Harris County Jail facilities. First, Plaintiffs have filed series of motions[1] requesting supplemental relief against the Sheriff of Harris County and the Harris County Commissioners Court (County Defendants). Second, County Defendants have filed a third-party action against various state officials (State

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[1] Plaintiffs' pending motions are: (1) Plaintiffs' motion to modify the Courts' November 8, 1988 Order, or, in the alternative, for an additional interim order (filed January 11, 1989); (2) Plaintiffs' motion for supplemental relief establishing population limits on the Harris County detention facilities (filed February 17, 1989); (3) Plaintiffs' motion for additional supplemental relief establishing population limits on the Harris County detention facilities (filed May 30, 1989); (4) Plaintiffs' motion for additional supplemental relief requesting additional jail staff assistants for the monitors, and good time credits (filed May 30, 1989); and (5) Plaintiffs' motion for a temporary restraining order and prelimiinary injunction (filed September 11, 1989).

Defendants)[2] alleging that the state officials are liable to them for all or part of Plaintiffs' claims against the county relating to conditions of confinement in the Harris County Jail. In particular, County Defendants claim that the State Defendants' refusal to accept all convicted felons ready for transfer into the Texas Department of Corrections (TDC) is the primary cause of unconstitutional conditions of confinement in the Harris County Jail. Third, in response to the Court's suggestion, Plaintiffs have filed a motion for leave to file a supplemental complaint against the State Defendants already joined as third-party defendants by County Defendants.[3]

Trial to the bench on County Defendants' third-party complaint commenced on August 14, 1989 and concluded on August 18, 1989. At the conclusion of evidence, the Court took the matter under advisement and requested post-trial briefs on certain issues. The Court subsequently held a hearing on Plaintiffs' request for supplemental relief from September 12, 1989 through September 15, 1989. Now, after reviewing the record, the testimony and credibility of the witnesses, and the applicable law, the Court concludes, as is more fully set forth in the findings of fact and conclusions of law below, that State Defendants and County Defendants are liable for the

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[2] State Defendants are the following state officials who control the admissions policy and population levels of the Texas Department of Corrections (TDC): William P. Clements, Governor of the State of Texas; James Lynaugh, Director of TDC; Charles T. Terrell, Chairman of the Texas Board of Corrections; and deralyn R. Davis, Joseph V. Lamantia, Allan Bruce Polunsky, James M. Eller, F. L. "Steve" Stephens, Dennis R. Hendrix, Robert Mann, and Jerry H. Hodges, Board Members on the Texas Board of Corrections.

[3] Actually, Plaintiffs seek to join several additional state officials who were not previously joined as third-party defendants by County Defendants. The additional state officials include the board members of the Texas Board of Pardons and Paroles as well as two baord members of the new Texas Board of Criminal Justice who were not included in County Defendants' list of the members of the previous Texas Board of Corrections. Moreover, Plaintiffs have attempted to name the State of Texas as a defendant. The list of state officials Plaintiffs seek to join presents problems that the Court will more fully address below.

unconstitutional conditions of confinement presently existing in the Harris County Jail facilities.

## PROCEDURAL HISTORY

On August 14, 1972, Lawrence R. Alberti and others filed a class action against County Defendants pursuant to 42 U.S.C. § 1983 claiming that conditions of confinement in the Harris County Jail facilities violated their statutory and constitutional rights. Two and a half years later, in February of 1975, the parties agreed to, and this Court entered, a consent judgment. The consent judgment required County Defendants, inter alia, to provide sufficient funds to increase jail capacity, to provide sufficient guards to assure safety without relying on inmate assistants, and to provide adequate medical, dental, and rehabilitative services to the inmates. The Court retained exclusive jurisdiction to issue interim orders necessary for relief in the action.

Not long after the February, 1975 consent decree was entered, Plaintiffs filed a motion for supplemental relief alleging: that County Defendants had failed to implement a viable pre-trial release program, and that the amount of financing committed to the construction of new facilities was wholly inadequate. After conducting a six-day evidentiary hearing on Plaintiffs' motion and touring the jail facilities, the Court issued a lengthy and detailed supplemental remedial order. See Alberti v. Sheriff of Harris County, 406 F.Supp. 649 (S.D. Tex. 1975).

Ultimately, the Court approved County Defendants' plans for the construction of a new central jail and a staffing plan that required County Defendants to provide at least one guard per forty-five inmates at the new facility. In August of 1983, Plaintiffs filed a motion for contempt, alleging that County Defendants had never succeeded in complying with the staffing order. After conducting a lengthy evidentiary hearing, the Court found the conditions existing within the jail to be

unconstitutional and entered yet another supplemental remedial order regarding minimum staffing levels at the jail facilities. See Alberti v. Sheriff of Harris County, 600 F.Supp. 443 (S.D. Tex. 1984), aff'd 790 F.2d 1220 (5th Cir. 1986).

After the Court appointed special masters in 1987 to monitor County Defendants' compliance with the Court's remedial orders, it appeared that a spirit of cooperation between Plaintiffs and County Defendants would eventually lead to full compliance with all Court orders with a minimum of direct judicial intervention. However, during 1988, TDC's refusal to accept all convicted felons ready for transfer from the jail prevented County Defendants from fully complying with this Court's orders.

By early November of 1988, the overcrowded conditions in the jail facilities had reached crisis proportions. After considerable negotiations among Plaintiffs, the Special Master, and County Defendants, the parties presented a proposed order to the Court at a November 4, 1988 hearing[4] that would require the Sheriff to transport to TDC each week at least 250 male and 40 female convicted felons who were ready for transfer. Three days later, Plaintiffs filed an unopposed motion for interim emergency relief that requested the entry of the proposed order discussed at the November 4 hearing. On November 8, 1988, the Court signed the requested order.[5]

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[4] The November 4 hearing had been previously set to consider the more mundane problem of establishing a budet for the Special Master. The Court recieved notice that the parties wanted to discuss the entry of the proposed order only one day prior to the hearing.

[5] In its August 11, 1989 opinion on State Defendants' petition for a writ of mandamus, the Court of Appeals incorrectly, yet understandably, concluded that this Court entered the November 8, 1988 Order sua sponte. See, In re: William P. Clements, No. 89-2706, Slip Opinion at p. 5 (5th Cir. 1989). In fact, the unopposed motion for interim emergency relief (instrument number 896 in file). Although Plaintiffs' motion was received by the Clerk's Office on November 7, 1988 (as indicated by a stamp on the

*(footnote continued on next page)*

Despite the Court's November 8, 1988 order, TDC refused to accept any convicted felons beyond the 182 felons it agreed to accept each week according to its "scheduled admissions policy." Without TDC's cooperation, the Sheriff was unable to comply with the Court's November 8, 1988 order. Therefore, on December 12, 1988, County Defendants filed a motion to stay the November 8, 1988 order and a motion asking the Court to require Plaintiffs to join the appropriate TDC officials as defendants pursuant to Fed. R. Civ. P. 19(a) and 21. Plaintiffs opposed County Defendants' motion to stay, and, although Plaintiffs agreed that TDC officials should be joined as parties, they had no desire to amend their complaint to add TDC officials as defendants.[6] Instead, Plaintiffs sought to have the noncooperating TDC officials held in contempt for interfering with the Sheriff's ability to comply with the November 8, 1988 order.

After conducting a conference on January 12, 1989, the Court granted the Sheriff's motion to stay the November 8, 1988 order, denied Plaintiffs' suggestion of contempt, [7] and denied County Defendants' motion to require Plaintiffs to join TDC officials as defendants. However, the Court granted County Defendants leave to join the appropriate

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*(footnote continued from previous page)*
reverse side of the last page of the proposed order that was attached as an exhibit to the motion), through clerical error, the motion was not "filed" until December 7, 1988.

[6] Plaintiffs argued that if TDC officials were to be joined, County Defendants hould join them as third-party defendants pursuant to Fed. R. Civ. P. 14(a).

[7] Contempt proceedings would have been an ill-suited method of determining whether TDC had any duty to accept felons pursuant to the Court's November 8, 1988 order. Moreover, the Court was concerned that contempt proceedings would have been premature because at that time there had not yet been a finding that the then existing conditions of confinement in the Harris County Jail facilities were unconstitutional. See, Benjamin v. Malcolm, 803 F.2d 46, n.6 (2d Cir. 1986), cert. denied sub. nom. Cuomo v. Koehler, 480 U.S. 910 (1987). (distinguishing Badgley v. Veralas, 729 F.2d 894 (2d Cir. 1984)).

state officials as third-party defendants pursuant to Fed. R. Civ. P. 14(a).

County Defendants filed their third-party complaint against State Defendants on January 20, 1989. State Defendants responded with a series of motions to dismiss, to transfer venue, to join additional parties, to stay proceedings, and to abstain from exercising jurisdiction. On May 12, 1989, after receiving extensive briefs, the Court denied all of State Defendants' motions.

On June 9, 1989, the Court entered an order that recognized the unusual procedural posture of this case and sought to establish an expeditious, yet procedurally fair, manner of resolving the issues raised in County Defendants' third-party complaint. Because the facts relevant to a determination of the appropriate relief County Defendants were entitled to by their third-party complaint appeared to be fully developed by the Special Master's June 2, 1989 Final Findings, the Court sua sponte moved for summary judgment in favor of County Defendants.[8] The Court indicated that if either party filed timely sworn objections to any of the Special Master's findings, the Court would proceed by holding a plenary evidentiary trial to the bench on August 14, 1989. Because both parties

[8] State Defendants objected to the Court's sua sponte motion for summary judgment, claiming that it not only violated Fed. R. Civ. P. 56, but that it was "fundamentallyu unfair under traditional notions of due process." See State Defendant's cross motion for summary judgment and response to Court's order of June 9, 1989 (instrument number 992 in file) at 3, n. 2. However, both the United States Supreme Court and the Fifth Circuit Court of Appeals have recognized that a district court may sua sponte grant summary judgment when the parties have been given adequate time for discovery and adeequate notice that they must come forward with all their evidence. See Celotex Corporation v. Catreett, 477 U.S. 317, 326 (1986); Page v. DeLaune, 837 F.2d 233, 238 (5th Cir. 1988). This case appeared to be well suited for disposition on summary judgment because the factual accuracy of the Special Master's findings could hardly be doubted. At the subsequent trial on County Defendants' third-party complaint, State Defendants offered no meaningful challenge to the accuracy of the Special Master's findings.

subsequently filed objections to the Special Master's June 2, 1989 findings, the Court's sua sponte motion for summary judgment became moot.

On May 30, 1989, Plaintiffs filed a motion asking the Court to transfer consideration of their requests for supplemental relief to the Honorable William Wayne Justice, the presiding judge in Ruiz v. Estelle, C.A. No. H-78-987 (S.D. Tex.). State Defendants responded to Plaintiffs' motion by urging a transfer of proceedings on County Defendants' third-party complaint; however, State Defendants objected to the transfer of Plaintiffs' pending motions. On June 29, 1989, State Defendants also filed a motion asking the Court to reconsider its May 12, 1989 Memorandum and Order denying their various motions to dismiss in light of the recent passage and acceptance of H.B. 2335.[9] By an order entered July 11, 1989, the Court denied Plaintiffs' motion to transfer proceedings and State Defendants' motion to reconsider.[10] Shortly thereafter, State Defendants filed an application for a writ of mandamus with the Fifth Circuit Court of Appeals asking the Court of Appeals to order this Court to transfer consideration of County Defendants' third-party complaint to the Ruiz court.

On August 11, 1989, the Friday preceding the trial scheduled for Monday, August 14, 1989, the Fifth Circuit Court of Appeals entered an order granting in part and denying in part State Defendants' petition for a writ of mandamus.[11] In essence the Court of Appeals allowed this Court to proceed with the August 14, 1989 trial to determine the merits of County

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[9] Acts 1989, 71st Leg., Ch. 785.

[10] In response to Plaintiffs' request for clarification, the Court also gave notice to the parties in its July 11, 1989 order that it would permit Plaintiffs to present evidence relevant to their pending motions for relief against County Defendants at the August 14, 1989 trial. Allowing Plaintiffs to participate in the August 14, 1989 trial quickly created problems the Court did not anticipate in its July 11, 1989 order. Thus, 24 days later, on August 4, 1989, the Court informed the parties that it would not hear evidence on Plaintiffs' pending motions at the August 14, 1989 trial.

[11] In re: William P. Clements, et al., No. 89-2706 (5th Cir. 1989).

Defendants' claims against State Defendants. However, in the event this Court found State Defendants liable to County Defendants, it was directed to transfer proceedings on the third-party complaint to Judge Justice for a determination of appropriate relief as to the State Defendants. Accordingly, the Court conducted the trial on County Defendants' third-party complaint in compliance with the Court of Appeals' directive. Thereafter, the Court concluded that it would be helpful to hear evidence on Plaintiffs' pending requests for relief. Thus, beginning September 12, 1989, the Court conducted a four-day hearing on Plaintiffs' pending motions. The Court allowed State Defendants to participate fully at the September 12 hearing and announced that it intended to consider all matters on a consolidated basis.

## ALIGNMENT OF THE PARTIES

After taking County Defendants' third-party complaint under advisement, the Court became concerned that the original joinder of State Defendants may have been technically defective. as indicated above, the Court originally denied County Defendants' motion seeking to force Plaintiffs to join State Defendants pursuant to Fed. R. civ. P. 19(a) and 21. Instead, Plaintiffs persuaded the Court that it would be more appropriate to join State Defendants as third-party defendants pursuant to Fed. R. Civ. P. 14(a). Moreover, under virtually identical circumstances, the Sixth and Second Circuit Courts of Appeals have held that joinder of State Defendants as third-party defendants is appropriate.[12] See Benjamin v. Malcolm, 803 F.2d 46 (2d Cir. 1986), cert. denied sub. nom. Cuomo v.

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[12] Tate v. Frey explicitly relied on Rule 14(a) as justifying the joinder of state officials by county officials. See Tate, 735 F.2d at 988-89. In Benjamin v. Malcolm, the Court of Appeals affirmed the district court's joinder of state officials as third-party defendants. However, the city defendants in Benjamin relied on Rules 19, 20 and 21 to justify joining state officials as third-party defendants. See Benjamin, 803 F.2d at 50; see also Benjamin v. Malcolm, 629 F.Supp. 713 (S.D. N.Y. 1986).

Koehler, 480 U.S. 910 (1987); Tate v. Frey, 735 F.2d 986 (6th Cir. 1984).

Nevertheless, County Defendants' joinder of State Defendants as third-party defendants pursuant to Rule 14(a) may have presented a serious jurisdictional problem under Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984). The Court expresses this concern at the hearing on Plaintiffs' requests for supplemental relief. In response to the Court's suggestion that an amended complaint would be appropriate, Plaintiffs filed a motion for leave to file a supplemental complaint naming various state officials as defendants pursuant to Fed. R. Civ. P. 15(d) and 19(a). The Court will grant Plaintiffs' motion for leave to file a supplemental complaint because the Court concludes that Plaintiffs' joinder of State Defendants pursuant to Rule 19(a) provides a more secure jurisdictional basis for relief than County Defendants' third-party complaint pursuant to Rule 14(a).

In its may 12, 1989 Memorandum and Order, the Court recognized that it had no jurisdiction to order State Defendants to obey state law.[13] However, the Court noted that this well recognized principle does not bar it from ordering State Defendants to conform their conduct to federal constitutional standards.[14] By way of explanation, the Court wrote:

> In the present case, [State Defendants] have two distinct duties: First, [State Defendants] have a state-imposed duty to "speedily" accept convicted felons into TDC. Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970). Second, [State Defendants] have a federal constitutional duty to not impose cruel

[13] May 12, 1989 Memorandum and Order at 8.

[14] May 12, 1989 Memorandum and Order at 8.

> and unusual punishment upon persons convicted of a felony in this state. If [State Defendants] have merely failed to "speedily" accept convicted felons into TDC as required by Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970), this Court is powerless to compel compliance. However, if [State Defendants] are directly responsible for the cruel and unusual punishment of convicted felons, this Court certainly has the authority to compel compliance with constitutional standards [footnotes and citations omitted].

May 12, 1989 Memorandum and Order at 8-9.

The Court believes that the passage quoted above accurately describes the "distinct duties" owned by State Defendants.[15] However, the cited passage failed to recognize explicitly that the "first distinct duty" owed by State Defendants is owed to County Defendants, whereas the "second distinct duty" owed by State Defendants is owed to the inmates at the Harris County Jail facilities, or the Plaintiff Class. The "second distinct duty," the duty to not impose cruel and unusual punishment, is the only federal duty this Court has the power to enforce.

The problem created by State Defendants' joinder as third-party defendants pursuant to Rule 14(a) becomes apparent once one recognizes that State Defendants' duty to not impose cruel and unusual punishment is owed to Plaintiffs, not to County Defendants. Rule 14(a) provides in relevant part:

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[15] Of course, State Defendants' state-law duty to "speedily" accept inmates was modified by H.B. 2335. Nevertheless, State Defendants' duties toward the County Defendants appear to remain grounded in state law.

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. . . .

Prior to 1948, Rule 14(a) permitted a defending party to join as a third-party defendant any person not a party to the action "who is or may be liable to the third-party plaintiff or to the plaintiff." (Emphasis added). However, because the courts had held that a plaintiff could not be compelled to amend his complaint to state a claim against an additional party if he did not wish to do so, [16] the phrase "or to the plaintiff" was deleted from Rule 14(a) in 1948.[17] Thus, Rule 14(a), as amended, only allows a defendant to implead a third-party defendant if applicable law renders the third-party defendant liable to the defendant for some or all of the plaintiff's claims against the defendant. See Wright & Miller, Federal Practice and Procedure: Civil, § 1446 at 258 (West 1971). in this case, joinder of State Defendants pursuant to Rule 14(a) may have been improper because the only duties State Defendants owe County Defendants appear to be created by state law - duties this Court cannot enforce under Pennhurst. The federal duty State Defendants have breached is owed to Plaintiffs, not County Defendants.

In both Tate v. Frey and Benjamin v. Malcolm the state officials faced claims that they had a state-law duty to accept convicted felons from the local jails. In both cases, the Courts of Appeals rejected the state officials' contentions that

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[16] Of course, the rule that a plaintiff cannot be compelled to state a claim against an additional party if he does not wish to do so does not apply if the conditions of Fed. R. Civ. P. 19 are met.

[17] See, Advisory Committee's Note to the 1948 amendment to Rule 14 reprinted at 5 F.R.D. 446-48.

Pennhurst barred relief against them because the courts noted that the district courts' orders were based upon findings that the state officials contributed to the violation of the inmates' federal constitutional rights. See Tate, 735 F.2d at 990; Benjamin, 803 F.2d at 52. Neither Court of Appeals appeared to be concerned, as this Court is, that local officials sought and were granted relief against state officials based on the state officials' violations of the inmates' rights, not the rights of the local officials.

The Benjamin Court cited the All Writs Act, 28 U.S.C. § 1651(a),[18] as providing federal jurisdiction over the city officials' claims against the state officials. Benjamin, 803 F.2d at 53. Relying on United States v. New York Telephone Co., 434 U.S. 159, 174 (1977), the Benjamin court noted that the Supreme Court had held that the All Writs Act authorizes a federal court in exceptional circumstances to issue orders to persons, "who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." Benjamin, 803 F.2d at 53 (citing New York Telephone, 434 U.S. at 174).

The Fifth Circuit Court of Appeals may ultimately follow Tate and Benjamin and conclude that federal jurisdiction exists over County Defendants' third-party complaint against State Defendants. For this reason, the Court will not disturb the present alignment between County and State Defendants. Nevertheless, the Court concludes that it would be remiss if it did not allow the filing of Plaintiffs' supplemental ecomplaint as an alternative basis for jurisdiction.

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[18] 28 U.S.C. § 1651(a) provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Court finds ample authorization in the Federal Rules of Civil Procedure and applicable case law that justifies such a post-trial amendment of pleadings. Fed. R. Civ. P. 21 provides, "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Federal courts have always recognized their duty to look beyond the pleadings on file to arrange the parties according to their true interests. See City of Indianapolis v. Chase National Bank of City of New York, 314 U.S. 63 (1941). Although such vigilance is normally required to avoid circumvention of the "complete diversity" rule of Strawbridge v. Curtiss, 3 Cranch 267 (1806), realignment may be necessary on other grounds as well.[19] In this case, Plaintiffs should be aligned as adversaries of State Defendants in order to avoid any questions of standing or jurisdiction.

State Defendants are clearly persons who should be joined if feasible under Rule 19(a)(1) because their joinder by Plaintiffs will not deprive the Court of jurisdiction and complete relief cannot be accorded among those already parties in their absence. The Fifth Circuit Court of Appeals has held that once a court has determined that a party should be joined under Rule 19(a), it should order the plaintiff to amend his

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[19] For example, in Forsberg v. Pacific Northwest Bell Telephone Co., 622 F.Supp. 1147 (D.Or. 1985), aff'd 840 F.2d 1409 (9th Cir. 1988), the district cout joined a union and union locals pursuant to Rule 19(a), then realigned the parties to ensure that any relief granted the plaintiff would be binding on the union and to protect the defendant employer from inconsistent liability. In Pennell v. Collector of Revenue, 703 F.Supp. 823 (W.D. Mo. 1989), the district court had to consider the proper alignment of the parties to determine whether all properly aligned defendants had joined in the removal petition as required. This Court itself recently had to consider the proper alignment of the parties in order to determine the necessity of a bond in a case where a preliminary injunction was entered and the United States was the nominal plaintiff. United States v. Taylor, et al., C.A. No. H-89-672. (S.D. Tex. March 21, 1989) (Memorandum and Order granting a preliminary injunction), aff'd, Nos. 89-2328, 89-2373 (5th Cir. August 28, 1989) (slip opinion).

complaint to add the party. English v. Seaboard Coast Line Railroad Co., 465 F.2d 43, 47 (5th Cir. 1972).

The United States Supreme Court has recognized that plaintiffs may have to resort to supplemental pleadings naming additional defendants where parties who were not originally joined as defendants have frustrated the Court's ability to vindicate plaintiffs' rights. See Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 226-27 (1964). The best practice would require parties to file supplemental pleadings raising all issues in advance of the trial. However, in this case the Court concludes that Rule 15(b) authorizes Plaintiffs' post-trial amendment so that the pleadings will conform to the evidence presented at the August 14, 1989 trial and at the September 12, 1989 hearing.

The State Defendants previously joined as third-party defendants will not be prejudiced by Plaintiffs' post-trial supplemental complaint because the pretrial pleadings on County Defendants' third-party complaint, the Court's Orders entered May 12, 1989 and July 11, 1989, and the course of the August 14, 1989 trial and September 12, 1989 hearing gave State Defendants actual notice that a key issue was whether State Defendants' conduct resulted in the cruel and unusual punishment of the inmates in the Harris County Jail. Where the parties are actually aware of the issues to be tried, the court does not impinge on the defendant's right to due process by allowing a post-trial amendment. See Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 840-41 (D.C. Cir. 1950); Wright & Miller, Federal Practice and Procedure: Civil, § 1491 (West 1971).

However, the Court concludes that it would be improper to allow Plaintiff to join, post-trial, additional state officials who did not fully participate in the proceedings already conducted as third-party defendants. Thus, the Court will allow Plaintiffs to file their supplemental complaint, but it will deny Plaintiffs' request to join additional parties and strike any

allegations in the supplemental complaint insofar as they apply to new parties.[20]

## FINDINGS OF FACT

1. Plaintiffs' claims against County Defendants and State Defendants arose in this district. County Defendants' claims against State Defendants also arose in this district.

2. The Harris County Jail facilities presently consist of the central jail, located at 1301 Franklin Street, and the detention center, located in Humble, Texas. County Defendants expect to complete renovation of the old "301 San Jacinto" jail by October of 1989 and to complete construction of a new "701 San Jacinto" jail by late 1991 or early 1992.

3. The design capacity according to the Texas Commission on Jail Standards for the 1301 Franklin central jail is 3,505 inmates. The design capacity of the Detention Center is 776 inmates. Thus, the total design capacity for the present Harris County Jail facilities is 4,281 inmates.

4. When completed, the design capacity of the old "301 San Jacinto" jail will be approximately 400, and the design capacity for the new "701 San Jacinto" jail will be approximately 4,000. Thus, by early 1992, the total design capacity of the Harris County Jail facilities will be approximately 8,681 inmates.

5. The actual inmate population at the downtown central jail on July 31, 1989 was 6,926, or 197.6% of its overall design capacity. The actual inmate population at the

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[20] Plaintiffs' request to join the State of Texas would have been futile even if made prior to trial. This Court has no jurisdiction to entertain legal or equitable relief against the State of Texas as an entity. Cory v. White, 457 U.S. 85 (1982); Edelman v. Jordan, 415 U.S. 651 (1974).

Detention Center on July 31, 1989 was 1,160, or 149.4% of its overall design capacity. Thus, the total inmate population for the Harris County facilities on July 31, 1989 was 8,086, or 188.8% of the facilities' overall design capacity. See County Defendants Exhibits No. 26 admitted at the August 14, 1989 trial.

6. By far the largest classes of inmates at the Harris County Jail facilities are convicted felons ready for transfer to TDC and felony pretrial detainees. On July 31, 1989 there were 3,420 convicted felons ready for transfer to TDC and 2,340 felony pretrial detainees. A complete breakdown of the population on July 13, 1989 follows:

| | |
|---|---|
| Pretrial Detainees: | |
| Felony Charges | 2,340 |
| Misdemeanor Charges | 155 |
| Both Misdemeanor & Felony Charges | 291 |
| Other Pretrial Detainees | 228 |
| | 3,014 |
| County Prisoners: | |
| Serving County Time | 820 |
| Serving County Fine | 81 |
| Serving County Time with Open Charges | 3 |
| Serving County Fine with Open Charges | 0 |
| | 904 |
| Class C Misdemeanors Only: | |
| Class C Serving Fine | 34 |
| Class C with Open Charges | 68 |
| | 102 |
| Felony Convictions: | |
| Awaiting Delivery Orders | 29 |

| | |
|---|---|
| Convictions with Additional Charges | 243 |
| Convictions Awaiting Delivery Order Dates | 3,420 |
| Convictions Awaiting Appeal | 80 |
| Convictions Serving County Time/Fine | 17 |
| | 3,789 |
| TDC Parole Violators | 30 |
| Bench Warrant Prisoners | 61 |
| Fugitives | 56 |
| Civil District Court Detainees | 6 |
| Federal Prisoners | 124 |
| Immigration Prisoners | 0 |
| | 277 |
| TOTAL: | 8, 086 |

7. The overcrowding problem at the Harris County Jail facilities is much more severe than the overall inmate-capacity figure of 188.8% indicates. Because County Defendants have steadfastly attempted to maintain appropriate classification and segregation of inmates, the population is not evenly distributed throughout the jail facilities. Very few cellblocks house less than 100% of their design capacity; most cellblocks house far in excess of the overall population figure of 188.8% of design capacity. In fact, many cellblocks house between 300% to 500% of their capacity. See County Defendants' Exhibit Nos. 15 and 39 admitted at the August 14, 1989 trial. Extreme overcrowding is the primary cause of the conditions of confinement listed below that inmates must endure at the Harris County Jail facilities.

8. Approximately 2,800-2,900 inmates must sleep on mattresses on the floor each night. See Testimony of Captain Don McWilliams at the August 14, 1989 trial.

9. Deputies are unable to control which inmates are allowed to sleep on bunks and which are relegated to the floor. Stronger inmates are free to impose their will upon weaker inmates. See testimony of McWilliams, supra; see also testimony of Michael Keating at the August 14, 1989 trial.

10. In some cellblocks, inmates form a "human carpet" in their attempt to find space to sleep on the floor. Some inmates sleep on the floor under fixed bunks, without enough clearance to even turn over during the night. See testimony of Steve Martin at the September 12, 1989 hearing.

11. The physical design of the central jail's cellblocks prevents a deputy from observing all inmates within a cell without entering the cell to make a visual inspection. See testimony of Keating, supra.

12. The number of deputies on the jail staff is insufficient to assure the safety of all inmates under the present extreme crowding situation. Deputies do not always enter every cell each hour for a visual inspection as required by this Court's Order entered December 18, 1984. See testimony of Keating, supra. See also testimony of Perry Johnson, Michael Reese, Don McWilliams at the September 12, 1989 hearing.

13. There has been a great increase in the number of reported disciplinary violations. Prior to the overcrowding crisis, there was an average of 250 to 350 disciplinary violations reported per month. Now there are over 600 disciplinary violations reported each month, and deputies no longer report minor violations. See testimony of McWilliams, supra.

14. Frequently, one half of the plumbing within a cellblock is not operable. On occasion, none of the faucets in an entire cellblock works. See testimony of McWilliams, supra.

15. Ventilation in the central jail is very poor. There is a 10 to 15 degree difference in temperature between the inner and outer ring of a floor. The fact that many inmates are heavy smokers exacerbates the ventilation problem. In some cellblocks the stench caused by the overcrowding of inmates is overwhelming. The walls are often slimy with humidity because of constant showering. See testimony of Keating, Martin, and Johnson, supra.

16. Fire safety in the central jail is severely compromised by the extreme overcrowding of the facilities. Housing areas are not protected by a sprinkler system. Thus, in the event of a major fire the only solution would be complete evacuation of all inmates. It would be virtually impossible to evacuate the nearly 7,000 inmates housed on the twelve floors of the central jail safely and quickly. There is no second means of egress at the Detention Center. See testimony of Johnson and Keating, supra.

17. The Sheriff is unable to continuously supply inmates with basic necessities such as clothing, soap, and feminine hygiene. Some inmates are left naked with only sheets or towels to cover themselves while their clothes are being washed. Many inmates must launder their own underwear in the cellblock sink. See testimony of Keating and McWilliams, supra.

18. The Sheriff has insufficient staff and equipment to provide appropriate food service for the current population. There are not enough trays to serve all inmates at once; therefore, trays must be immediately washed and recycled during breakfast and dinner until everyone is fed. It takes approximately three hours to feed all of the inmates in the central jail. Breakfast usually begins at about 3:30 a.m. and dinner begins at about 4:00 p.m. There is no longer enough room in the "day rooms" to feed all the inmates; thus, many inmates must eat their meals in their cell while sitting on the

floor, on the toilet, in a shower stall, or on a bunk. Eating in the cells has contributed to sanitation problems. See testimony of Keating and McWilliams, supra.

19. The medical staff at the Harris County Jail facilities is unable to provide adequate medical care for the current population. Inmate requests for medical attention frequently are not granted for a month or more. On one occasion, a jail physician delayed full treatment of an inmate's ulcer because the physician simply did not believe the inmate when the inmate reported that he had blood in his vomit. As a result, the inmate died of a bleeding ulcer. Other cases of indifference were documented. The medical care provided to the inmates at the Harris County Jail facilities constitutes conscious indifference towards the inmates' serious medical needs. See testimony of Dr. Armond Start and Dr. Michael Sargant at the September 12, 1989 hearing; see also testimony of Keating, McWilliams, Reese, supra.

20. A recent outbreak of a pneumococcal infection at the Harris county Jail facilities is directly related to the overcrowded conditions. Two inmates died from this infection and approximately 30 other were hospitalized or treated at the jail clinic. See testimony of Dr. Daniel Musher at the September 12, 1989 hearing.

21. The Harris County Pretrial Services Agency (PTSA) interviews approximately 95% of all inmates entering the Harris County Jail facilities to determine which inmates may qualify for pretrial release on personal bonds without sureties. A PTSA employee interviews the inmate to determine elements of the inmate's background relevant to the inmate's likelihood of appearing in court if released on a personal bond. PTSA has developed an objective system of "scoring" each inmate. A perfect score is 7; inmates with a score of 5 or above are considered good candidates for release on a personal bond and their application is forwarded to the

appropriate judge. See testimony of Charles Noble at the August 14, 1989 trial.

22. In an average month, PTSA will interview approximately 1,700 inmates arriving with felony charges. Of the 1,700 interviewed, PTSA will forward approximately 485 to 585 applications to the appropriate state district judge. All of the applications forwarded to the district judge reflect inmates who, on an objective scale, would be good candidates for pretrial release on a personal bond. During an average month only 150 to 160 applications for personal bonds are approved. See testimony of Noble, supra.

23. While district judges are considering the release of persons generally accused of far more serious crimes requiring greater concern for public safety, the county judges have obviously given greater weight to PTSA recommendations than have the district judges. One-half of the district judges approve fewer than 100 personal bonds per year. The director of PTSA testified that many district judges do not consider the great majority of applications for personal bond that are forwarded to them. For example, on a given day, one judge reviewed only three of the 53 applications presented to him relating to inmates who would be good candidates for release on personal bond. Of the three applications the judge reviewed, only one was approved. See, State Defendants' exhibit numbers 70 and 72. See also testimony of Noble, supra.

24. In light of credible testimony that district judges refuse to consider personal bonds for inmates who by objective criteria would be good candidates for release, this Court concludes that the restriction of liberty of such pretrial detainees is arbitrary and purposeless.

25. Ultimately, counsel for State Defendants and counsel for County Defendants admitted in open court that the conditions of confinement in the Harris County Jail facilities are unconstitutional. After considering the totality of the

conditions of confinement in the Harris County Jail facilities, the Court finds that those conditions are cruel and unusual in violation of the Eighth and Fourteenth Amendments.

26. State Defendants' refusal to accept convicted felons ready for transfer to TDC has caused those inmates to suffer cruel and unusual punishment in the Harris County Jail facilities.

27. County Defendants have failed to provide a safe and suitable jail as required by the consent decree and the Court's subsequent remedial orders. Even if all TDC-ready prisoners were removed from the jail, the population would still exceed design capacity by approximately 400 inmates.

28. Because of the poor physical design of the central jail and the lack of a second means of egress from the Detention Center, the Court finds that the maximum constitutional capacity for the Harris County Jail is its overall design capacity, or a total of 4,281 inmates. This Court's previous staffing order entered December 18, 1984 assumed that a 9-9-7 staffing ratio could adequately safeguard no more than the number of inmates the facilities were designed to house.

29. State Defendants acted under color of state, not federal, law when the implemented the scheduled admissions policy that caused the overcrowding crisis in the Harris County Jail facilities. State Defendants could have complied with the requirements of the Ruiz decree without refusing to accept prisoners. Federal authority did not require them to refuse to accept inmates from county jails. The most obvious alternative would have been to timely build new prison facilities. The Court described other alternatives in its May 12, 1989 Memorandum and Order. State Defendants' actions are fairly attributable to the State for purposes of the Fourteenth Amendment.

30. An actual controversy exists between County Defendants and State Defendants. County Defendants' assertion of the right of Plaintiffs via County Defendants' third-party complaint has allowed the applicable constitutional issues to be presented vigorously and cogently.

## CONCLUSIONS OF LAW

1. The Court has jurisdiction over Plaintiffs' supplemental complaint against State Defendants pursuant to 28 U.S.C. § 1343 (a) (3).

2. The Court has jurisdiction over Plaintiffs' requests for supplemental relief pursuant to the consent judgment entered in this case on February 4, 1975 and 28 U.S.C. § 1343 (a) (3).

3. The Court has jurisdiction over County Defendants' third-party complaint pursuant to 28 U.S.C. §§ 1331, 1343 (a) (3) and 1651 (a). Moreover, the Court has ancillary jurisdiction over County Defendants' third-party complaint. See Owen Equipment and Erection Company v. Kroger, 437 U.S. 365, 375 at n. 18 (1978); Rogers v. Aetna Casualty and Surety Company, 601 F.2d 840, 843 at n. 4 (5th Cir. 1979); Wright & Miller, Federal Practice and Procedure: Civil, § 1444, at 223 n. 68 (West 1971).

4. Venue for Plaintiffs' supplemental complaint against State Defendants lies in this district because Plaintiffs' claims against State Defendants arose in this district. (See finding of fact 1.) 28 U.S.C. § 1391 (b).

5. Venue for County Defendants' third-party complaint against State Defendants lies in this district because their claims against State Defendants arose in this district. (See finding of fact 1.) 28 U.S.C. § 1391 (b). Moreover, State Defendants, as third-party defendants pursuant to Rule 14, may not contest venue. F&D, Inc. v. O'Hara & Kendall Aviation,

Inc., 547 F.Supp. 44, 45 (S.D. Tex. 1982). See also Lone Star Package Car Co. v. Baltimore & O.R. Co., 212 F.2d 147 (5th Cir. 1954); Wright & Miller, Federal Practice and Procedure: Civil, § 1445 at 240 n. 14 (West 1971).

6. Although the Eleventh Amendment bars this Court from ordering State Defendants to obey state law, Pennhurst School & Hospital v. Halderman, 465 U.S. 89 (1984), the Court has jurisdiction to assure that State Defendants conform their conduct to federal constitutional standards. Ex parte Young, 209 U.S. 123 (1908).

7. This Court's jurisdiction is limited to "actual cases or controversies." Art. III, § 2, U.S. Const.; Flast v. Cohen, 392 U.S. 83 (1968). A corollary of this rule requires a party to have "standing" to assert its claims. The United States Supreme Court has noted that the "gist" of standing requires a litigant to allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues. . . ." Baker v. Carr, 369 U.S. 186, 204 (1962). In another context, the Supreme Court has held that a litigant must show some "injury to himself that is likely to be redressed by a favorable decision." Simon v. Eastern Kentuky Welfare Rights Organization, 426 U.S. 26, 38 (1976). Although litigants are not normally allowed to assert the rights of third parties, the Supreme Court has made it clear that this limitation is not constitutionally mandated. Craig v. Boren, 429 U.S. 190, 193 (1976). Instead, the limitation on a litigant's ability to assert the right of a third party is simply a "rule of self-restraint" based on "prudential objectives." Id. So long as a litigant asserts a sufficiently concrete interest in the outcome of its suit to meet the case or controversy requirement of Article III, a federal court may allow the litigant to assert the rights of a third party where the applicable constitutional questions have been and continue to be presented vigorously and `cogently'. . . ." Id at 194; see also Singleton v. Wulff, 428 U.S. 106, 112-16 (1976); Benjamin, 803 F.2d at 54.

8. In order to be entitled to relief under 42 U.S.C. § 1983, a party must prove: (1) that the defendant deprived him of a right secured by the Constitution or laws of the United States, and (2) that the defendant deprived him of that right under color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1980); Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155 (1978); Sims v. Jefferson Downs, Inc., 778 F.2d 1068, 1076 (5th Cir. 1985).

9. The Eighth Amendment, which prohibits cruel and unusual punishment, is applicable to the states through the Fourteenth Amendment. Rhodes v. Chapman, 452 U.S. 337, 344-45 (1981); Robinson v. State of California, 370 U.S. 660, 666 (1962).

10. Normally, the involvement of a state official "plainly provides the state action essential to show a direct violation of [a plaintiff's] Fourteenth Amendment . . . rights, whether or not the actions . . . were official authorized or lawful." Flagg Brothers, 436 U.S. at 157 n.5 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970)). In an action pursuant to 42 U.S.C. § 1983, the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 929 (1982). However, state officials who act solely pursuant to federal authority, act under color of federal, not state, law and are not subject to liability under 42 U.S.C. § 1983. District of Columbia v. Carter, 409 U.S. 418, 424 (1973); Askew v. Bloemker, 548 F.2d 673, 676-77 (7th Cir. 1976). A party deprived of his federally-protected rights by an official acting under color of federal law must state a claim under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) and its progeny. See, Carter, 409 U.S. at 610. (See Finding of Fact 29.)

11. There is no static test by which to determine whether conditions of confinement are cruel and

unusual. Rhodes, 452 U.S. at 346. The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Id. at 346 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). This Court need not separately weigh each of the challenged constitutional practices and conditions; instead, it must look to "the totality of the conditions" existing in the Harris County Jail facilities. Alberti v. Klevenhagen, 790 F.2d 1220, 1224 (5th Cir. 1986) (citing Ruiz v. Estelle, 679 F.2d 1115, 1139 (5th Cir.), modified on other grounds, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). "The totality of conditions of confinement does not offend the Constitution unless prison conditions are cruel and unusual, not merely harsh and restrictive." Alberti, 790 F.2d at 1224 (quoting Ruiz, 679 F.2 at 1140).

12. In determining the constitutionality of the confinement of pretrial detainees, the Court must apply the Due Process Clause of the Fourteenth Amendment, not the Eighth Amendment. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (citing Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977)). Under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt. Bell, 441 U.S. at 535. However, not every disability imposed during pretrial detention amounts to "punishment" in the constitutional sense. Id. at 537. For example, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Id. at 539. Conversely, if a restriction or condition is not reasonably related to a legitimate goal - if it is arbitrary or purposeless - this Court may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees. Id. at 539.

13. In determining the amount of bail required to secure the release of an accused prior to trial, the Harris County Courts at law and District Courts are governed in

the exercise of their discretion by the Constitution and by the following rules:

> 1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
>
> 2. The power to require bail is not to be so used as to make it an instrument of oppression.
>
> 3. The nature of the offense and the circumstances under which it was committed are to be considered.
>
> 4. The ability to make bail is to be regarded, and proof may be taken upon this point.
>
> 5. The future safety of a victim of the alleged offense may be considered.

Tex. Code Crim. Proc. Ann. art. 17.15 (Vernon Supp. 1989).

The County Courts at law and District Courts also have the discretion to release a defendant on his personal bond without sureties or other security. Tex. Code Crim. Proc. Ann. art 17.03 (Vernon 1977). The primary purpose of an appearance bond is to secure the presence of a defendant in court at his trial. Ex parte Ivey, 594 S.W.2d 98 (Tex. Crim. App. 1980).

14. Pretrial detainees are entitled to reasonable medical care unless the failure to supply the care is reasonably related to a legitimate governmental objective. Cupit v. Jones, 835 F.2d 82 (5th Cir. 1987).

15. Convicted inmates are entitled to medical care that does not constitute deliberate indifference to their

serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

16. Upon a finding that State Defendants and County Defendants are liable for the unconstitutional conditions of confinement presently existing in the Harris County jail facilities, the Court must fashion "the least intrusive remedy that will still be effective." Ruiz, 679 F.2d at 1145. This proposition does not mean that the Court must exhaust all conceivable avenues of relief against County Defendants before imposing relief against State Defendants. See, Benjamin, supra at 53. State Defendants and County Defendants deserve the same respect from the Court.

17. Under Texas law, the county sheriffs and commissioners courts are the keepers of the jails. Tex. Local Gov't Code Ann. §§ 351.001-.015 and §§ 351.041-.042 (Vernon 1988).

18. Under Texas law, TDC (now TDCJ, or the Texas Department of Criminal Justice) is responsible for the confinement of convicted felons. Tex. Penal Code Ann. §§ 12.32-.34 (Vernon 1974 and Cumm. Supp. 1989); Tex. Code Crim. Proc. Ann. art. 42.09 (Vernon Supp. 1989).

19. Prior to September 1, 1989, the effective date of H.B. 2335, the transfer of convicted felons from the Harris County Jail to TDC was governed by the interplay between Tex. Code Crim. Proc. Ann. art 42.09 (West Supp. 1989) and Tex. Rev. Civ. Stat. Ann. art. 6166r (West 1970). Sections 2 and 3 of Article 42.09 of the Texas Code of Criminal Procedure explicitly provide that convicted felons shall be committed to TDC under certain circumstances pending, or at the conclusion of, an appeal. Sections 1 and 4 of Article 42.09, however, appear to envision at least a temporary stay at the jail when a felon does not appeal his conviction or when a felon appeals his conviction but his sentence is for a term of ten years or less. In the past, a convicted felon's temporary confinement

in the Harris County Jail created no serious problems because Article 6166r required TDC to make suitable provisions for the "safe and speedy transportation of prisoners from counties where sentenced to the State penitentiary. . . ."

20. H. B. 2335 made two important changes with respect to the transfer of convicted felons from the county jails to TDC. First, section 3.04 of H.B. 2335 deleted the requirement that TDC's acceptance of convicted felons be "speedy." Second, section 3.06 of H.B. 2335 requires the Texas Board of Criminal Justice to adopt and enforce an allocation formula that limits the number of convicted felons the institutional division will accept from the counties until sufficient capacity is available in the institutional division. H. B. 2335 did not, however, relieve State Defendants of their responsibility for the confinement of convicted felons. The State of Texas is free to allocate the admissions of felons into the penitentiary in virtually any manner it chooses so long as the allocation does not result in the cruel and unusual punishment of inmates. However, when it becomes clear that convicted felons are being confined in conditions that violate the Eighth Amendment, the relevant inquiry becomes who is responsible for the confinement of these inmates. Fortunately, H.B. 2335 provides a clear answer to this inquiry. Section 1.02 (a) (1) provides, "The department [TDCJ, formerly TDC] is the state agency with primary responsibility for . . . the confinement, supervision, and rehabilitation of felons. . . ." Thus, the fact that the State of Texas has "virtually complete freedom to decide who will be responsible" for the confinement of felons provides no shield from liability for State Defendants in this case because state law clearly places the primary responsibility for the confinement of felons upon them. See Bush v. Viterna, 795 F.2d 1203, 1209 (5th Cir. 1986).

21. In essentially the same circumstances, the Fifth Circuit Court of Appeals has held that state officials cannot disclaim responsibility for cruel and unusual conditions of confinement of prisoners committed to their custody on the

ground that they have no control over the operation of local jails. Stewart v. Winter, 669 F.2d 328 (5th Cir. 1982). Subsequently, the Second Circuit came to the same conclusion. See Benjamin, 803 F.2d at 51. Bush v. Viterna supra did not purport to overrule Stewart v. Winter. In fact, the Bush panel could not have overruled Stewart because the Fifth Circuit Court of Appeals adheres to the rule that only intervening Supreme Court authority or the Court sitting en banc can overrule a previous panel decision. Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982); Fulford v. Klein, 529 F.2d 377 (5th Cir. 1976), majority opinion adopted by en banc court, 550 F.2d 342 (5th Cir. 1977). The Court is not aware of any intervening en banc or Supreme Court authority purporting to overrule Stewart. Thus, to the extent that H.B. 2335 attempts to exculpate State Defendants from liability for the cruel and unusual punishment of convicted felons incarcerated at county jails, it is ineffective.

22. A convicted felon ready for transfer to TDC is defined as:

> (a) An individual who is being confined pursuant to a judgment of conviction and sentence imposed in a felony case pursuant to a plea of guilty or nolo contendere (such individual being deemed "ready for transfer" on the date of sentencing); or
>
> (b) An individual who is being confined pursuant to a judgment of conviction and sentence imposed in a felony case pursuant to the verdict or a jury or judge after a plea of not guilty by the defendant (such individual being deemed "ready for transfer" on (1) the date the defendant is taken into custody

after affirmance of his or her conviction, if the defendant appeals the conviction and is released on bail pending disposition of the appeal, pursuant to Tex. Crim. Proc. Code Ann. § 42.09(2) (Vernon Supp. 1989); or on (2) the date the defendant requests transfer to the TDC, if the defendant is convicted of a felony and his sentence is a term of ten (10) years or less and he gives notice of appeal, pursuant to Tex. Crim. Proc. Code Ann. 42.09(4) (Vernon Supp. 1989; or (3) the date notice of appeal is filed or the time for filing notice of appeal passes, whichever date first occurs, if a defendant is convicted of a felony and sentence to death, life or a term of more than ten (10) years in the TDC pursuant to Tex. crim. Proc. Code Ann. § 42.09(3) (Vernon Supp. 1989)); and

(c) the individual has no other criminal detainers or criminal cases pending in county, state or federal trial courts; and

(d) all paperwork customarily required to transfer the individual to TDC has been satisfactorily completed pursuant to Tex. Crim. Proc. Code Ann. §§ 42.03(3), (4) (Vernon 1979) and 42.09(8) (Vernon Supp. 1989).

## CONCLUSION

As indicated by the findings and conclusions above, the Court has determined that State Defendants and

County Defendants are liable for the unconstitutional conditions of confinement in the Harris County Jail facilities.

The Fifth Circuit Court of Appeals has correctly bifurcated this case so that authority to decide any relief against State Defendants that affects the management or operations of the Department of Corrections rests with Judge Justice, the presiding judge in the Ruiz prison case. Despite the urgency for immediate remedy amply demonstrated by this record, the Court concludes that it should delay the imposition of relief against County Defendants so that the relief formulated by Judge Justice against State Defendants may be coordinated and interwoven with the remedial action required of the County. This appears to be the most logical approach the Court can take to determine "the least intrusive remedy that will still be effective." The Court envisions the issuance of a joint order or simultaneous orders of the judges.

But the solution to unconstitutional conditions in state penitentiaries and local jails requires more than the joint effort of two federal judges. Just decisions should be made by those who have the primary responsibility to make them -- the appropriate state and county officials. The Governor and the County Judge of Harris County have shown a willingness to find solutions fair to the citizenry of Harris County and the State and true to the constitution. Prior to the recent evidentiary hearings, Governor Clements and County Judge Lindsey, their staffs and attorneys, together with the court appointed monitors and counsel for the inmates, met in a marathon session to resolve differences and to find solutions to the growing national problem of prison overcrowding, which is particularly acute here.

The evidentiary hearings themselves were conducted in a dispassionate, orderly and thorough fashion. Early rancor and emotionalism dissipated in the face of an evidentiary record in which much was undisputed. In light of

these factors, meaningful dialogue among the parties should continue.

Time will be required for Judge Justice to review proceedings here. This interval can be used by the parties to make every attempt to resolve issues without unnecessary judicial intervention.

The overcrowding in the Harris County facilities is extreme. Large and immediate reductions in inmate population are in order. The Court suggests that the parties look to the large groups of transfer-ready felony inmates, pretrial felony detainees and parole-eligible prisoners for such reductions. The state judiciary might be consulted so that recognition be given to the realistic policy of personal recognizance release of pretrial detainees as a more palpable alternative to the early release on parole of a like number of convicted felons by the use of the Texas Prison Management Act. Obviously all other means and options must be carefully scrutinized in the process. Accordingly, it is hereby

ORDERED that Plaintiffs' motion for leave to file a supplemental complaint is GRANTED but Plaintiffs' request to join additional parties is DENIED. Allegations in the supplemental complaint are STRICKEN insofar as they apply to new parties. It is further

ORDERED that State Defendants are liable to County Defendants on County Defendants' third-party complaint. It is further

ORDERED that State Defendants are liable to Plaintiffs on Plaintiffs' supplemental complaint. It is further

ORDERED that County Defendants' third-party complaint and Plaintiffs' supplemental complaint are TRANSFERRED to the Honorable William Wayne Justice for proceedings in accordance with the mandamus opinion of the Fifth Circuit Court of Appeals entered in this case. It is further

ORDERED that the Special Master arrange a meeting of all the principals and parties involved in this case in order to facilitate a settlement regarding the appropriate relief to be imposed.

SIGNED in Houston, Texas, this 25th day of September, 1989.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

## APPENDIX Y

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| LAWRENCE R. ALBERTI; ET AL. | § | |
| VS. | § | CIVIL ACTION |
| | § | NO. H-72-1094 |
| JOHNNY KLEVENHAGEN; ET AL. | § | |

**MEMORANDUM AND ORDER**

Pending before the Court are Third-Party Defendants'[1] motion to dismiss, or, in the alternative, for joinder of all Texas counties and all inmates allegedly backlogged in Texas county jails, Third-Party Defendants' motion to dismiss for lack of venue, or, to transfer venue, and Third-Party Defendants' motion to stay these proceedings pending an application to the Judicial Panel on Multi-district Litigation.

A detailed recitation of the tortuous history of this case is unnecessary for present purposes. Suffice it to say that Defendants Harris County Commissioners Court and the Sheriff of Harris County have never fully succeeded in

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[1]Third-Party Defendants are the following state officials who control the admissions policy and population levels of the Texas Department of Corrections (TDC): William P. Clements, Governor of the State of Texas, James Lynaugh, Director of TDC, Charles T. Terrell, Chairman of the Texas Board of Corrections, Deralyn R. Davis, Joseph V. Lamantia, Allan Bruce Polunsky, James M. Eller, F. L. "Steve" Stephens, Dennis R. Hendrix, Robert Mann, and Jerry H. Hodges, Board Members of the Texas Board of Corrections.

complying with the terms of a 1975 consent decree[2] and subsequent remedial orders[3] that were designed to ensure that the conditions of confinement in the Harris County jails met applicable constitutional and statutory requirements. In fact, in 1985, the Court actually found Defendants to be in contempt for their failure to hire sufficient deputies as ordered. Alberti, et al. v. Sheriff of Harris County, No. C.A.-H-72-1094 (S.D. Tex. May 24, 1985) (order finding Defendants in civil contempt).

After the Court appointed special masters in 1987 to monitor Defendants' compliance with the Court's remedial orders, it appeared that a spirit of cooperation between the Plaintiff class and Defendants would facilitate continued progress towards full compliance with all Court orders with a minimum of direct judicial intervention. However, through 1988 it became obvious that TDC's refusal to accept all convicted felons as required under state law made it absolutely impossible for Harris County and the Sheriff to comply with this Court's orders.

By the end of 1988, the overcrowded conditions in the Harris County jails had reached crisis proportions. After considerable negotiations between Plaintiffs, the Special Master, and Defendants, the parties requested the entry of an essentially agreed order[4] that required the Sheriff to begin delivering at least 250 male and 40 female convicted felons to TDC each week.[5] When TDC officials refused to accept any

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[2]Alberti, et al. v. Sheriff of Harris County, No. C.A.-H-72-1094 (S.D. Tex. Feb. 4, 1975) (consent judgment).

[3]See, Alberti, et al. v. Sheriff of Harris County, 406 F.Supp. 649 (S.D. Tex. 1975); Alberti v. Sheriff of Harris County, 600 F.Supp. 443 (S.D. Tex. 1984) aff'd 790 F.2d 1220 (5th Cir. 1986).

[4]Actually, Defendants were careful not to "agree" to the entry of the order, but they were willing to express their "non-opposition" to the entry of the requested order.

[5]Alberti, et al. v. Sheriff of Harris County, et al., No. C.A.-H-72-1094 (S.D. Tex. Nov. 8, 1988) (order requiring delivery of convicted felons to TDC).

convicted felons above its meager self-imposed quota, a new and more complex phase of litigation began.

By an order entered January 20, 1989, the Court granted Harris County and the Sheriff leave to implead Third-Party Defendants, and, on the same date, a third-party complaint was filed. Third-Party Defendants responded with a series of motions to dismiss, to transfer venue, to join additional parties, to stay proceedings, and to abstain from exercising jurisdiction. After considering the briefs submitted by the parties and the applicable law, the Court has decided to deny each and every one of Third-Party Defendants' motions. A discussion of the relevant issues raised by Third-Party Defendants follows:

I. Third-Party Defendants' motion to stay proceedings pending an application to the Judicial Panel on Multidistrict Litigation.

Third-Party Defendants ask this Court to stay proceedings pending an application to the Judicial Panel on Multidistrict Litigation for consolidation of related litigation pursuant to 28 U.S.C. § 1407. Harris County and the Sheriff respond by arguing that this case is not suitable for consolidation under 28 U.S.C. § 1407. However, the question of whether this case is suitable for pretrial consolidation is for the Judicial Panel on Multidistrict Litigation, not this Court, to decide.

The simpler question is whether this Court should stay proceedings pending such an application. This question is easily answered in the negative for two reasons. First, Rule 18 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation explicitly provides:

> The pendency of a motion . . . before the Panel concerning transfer . . . of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district

> court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court.

Second, although Third-Party Defendants filed their motion to stay proceedings on February 6, 1989, since that time there has been no indication that such an application has been filed with the Judicial Panel on Multidistrict Litigation.[6] Obviously, Third-Party Defendants are not seriously interested in pursuing the consolidation of this case for multidistrict litigation. And, as already indicated, even if Third-Party Defendant had filed a motion to transfer pursuant to 28 U.S.C. § 1407, there would be no reason to stay proceedings in this case.

II. Third-Party Defendants' motion to dismiss for lack of venue, or to transfer venue.

Third-Party Defendants ask this Court to dismiss the complaint against them for lack of venue, or, alternatively, to transfer this case to the United States District Court for the Western District of Texas, Austin Division. In support of their motion, Third-Party Defendants argue that venue for Defendants' third-party complaint properly lies only in the district where all Third-Party Defendants reside or where the claim arose. See, 28 U.S.C. § 1391(b).

However, Third-Party Defendants appear to have overlooked considerable authority in this circuit and elsewhere supporting the proposition that Fed. R. Civ. P. 14 "overrides the general venue statute, 28 U.S.C. § 1391, and that an impleaded third-party defendant may not raise the venue issue." F&D, Inc. v. O'Hara & Kendall Aviation, Inc., 547 F.Supp. 44, 45 (S.D. Tex. 1982). See also, Lone Star Package Car Co. v. Baltimore

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[6]Rule 7(c) of the Rules of Procedure of the Judicial Panel on Multi-district Panel on Multi-district LItigation requires copies of any motions for transfer pursuant to 28 U.S.C. § 1407 to be filed in each district court in which an action is pending that will be affected by the motion. A review of the record in this case reveals that no such motion has been filed.

& O.R. Co., 212 F.2d 147 (5th Cir. 1954); Wright & Miller, Federal Practice and Procedure: Civil, § 1445 n.14 (West 1971).

Even if the venue requirements of 28 U.S.C. § 1391(b) applied to the third-party complaint, the Court finds that the claim arose in this district and that it would not serve the convenience of the parties of the interests of justice to transfer this case.

III. Third-Party Defendants' motion to dismiss, or, in the alternative, for joinder of all Texas counties and all inmates allegedly backlogged in Texas county jails.

Third-Party Defendants' motion to dismiss, etc. turns out to be a tour de force listing, according to the Court's count, six different reasons why the Court should either dismiss the third-party complaint, abstain from exercising jurisdiction over the third-party complaint, or join additional parties. The Court will examine each argument separately below.

A. Third-Party Defendants have no duty to remedy constitutional violations of inmates' rights in local jails.

Third-Party Defendants cite Bush v. Viterna, 795 F.2d 1203 (5th Cir. 1986) in support of their argument that they have absolutely no duty to remedy constitutional violations of inmates' rights in local jails. In particular, Third-Party Defendants rely on the Bush court's statement that "The states have virtually complete freedom to decide who will be responsible for such tasks [as operating a prison], and therewith to determine who will be held liable for civil rights violations that occur in the course of carrying them out." Third-Party Defendants then note that under Texas law the county sheriffs and commissioners courts are keepers of the jails. See, Bush, 795 F.2d at 1206; see also, Tex. Local Gov't Code Ann. §§ 351.015 and §§ 351.042 (Vernon 1988).

The Court, however, finds Bush to be so factually and legally dissimilar to the present case that it cannot be used as a shield from liability here. The plaintiffs in Bush had sued the Texas Commission on Jail Standards alleging that the Commissions' failure to promulgate and enforce sufficient regulations ensuring constitutional conditions in county jails entitled them to relief under 42 U.S.C. § 1983. The Court of Appeals held that the Commission could not be held vicariously liable for the acts of county officials in the maintenance of their jails. The Court of Appeals also held that because the Commission had no state-law duty to correct violations of its regulations by county jails, the Commission's failure to act could not be considered to be a cause of any injury that inmates at county jails may suffer.

In the present case, Harris County and the Sheriff are seeking to impose direct, not vicarious, liability upon Third-Party Defendants. In contrast to the Texas Commission on Jail Standards, Third-Party Defendants have a state and constitutionally imposed duty to provide appropriate conditions of confinement for the approximately 3500 convicted felons currently incarcerated in the Harris County jails. Third-Party Defendants cannot disclaim their responsibility for providing constitutional conditions of confinement to convicted felons by simply refusing to accept physical custody of those inmates. See, Stewart v. Winter, 669 F.2d 328 (5th Cir. 1982).[7]

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[7]See also, Benjamin v. Malcolm, 803 F.2d 46, 51 (2d Cir. 1986), cert. denied, 480 U.S. 910 (1987) (noting that the State of New York could not disclaim its federal constitutional duties to "state-ready" prisoners because such prisoners "are not those of some other state, country or planet, but its own prisoners who have been convicted by new York State courts for New York state felonies.")

B. Even if Third-Party Defendants had a state-law duty to accept convicted felons into TDC, this Court has no jurisdiction to enjoin state officials to comply with state law.

Third-Party Defendants correctly point out that this Court has no jurisdiction to order state officials to obey state law. Pennhurst School & Hospital v. Halderman, 465 U.S. 89 (1984). However, this well-recognized principle does not bar this Court from ordering state officials to conform their conduct to federal constitutional standards. Ex Parte Young, 209 U.S. 123 (1908).

In the present case, Third-Party Defendants have two distinct duties: First, Third Party Defendants have a state-imposed duty to "speedily" accept convicted felons into TDC. Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970). Second, Third-Party Defendants have a federal constitutional duty to not impose cruel and unusual punishment upon persons convicted of a felony in this state. If Third-Party Defendants have merely failed to "speedily" accept convicted felons into TDC as required by Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970), this Court is powerless to compel compliance. However, if Third-Party Defendants are directly responsible for the cruel and unusual punishment of convicted felons, this Court certainly has the authority to compel compliance with constitutional standards.[8] Alberti v. Klevenhagen, 790 F.2d 1220, 1226-1228 (5th Cir. 1986).

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[8]Obviously, in many less-populated counties across Texas Third-Party Defendants may have failed to comply with their state-law duty to accept convicted felons into TDC without causing the cruel and unusual punishment of the inmates remaining in the county jails. It would appear that a federal district court would be without jurisdiction to fashion a remedy in such a case.

C. Any duty Third-Party Defendants have to accept convicted felons into TDC must give way to capacity orders entered in Ruiz v. Procunier, No. H-78-987-CA (S.D. Tex.).

Third-Party Defendants argue that the Supremacy Clause of the United States Constitution requires them to obey a court-approved stipulation entered in Ruiz v. Procunier, No. H-78-987-CA (S.D. Tex.), which requires them to limit the inmate population within the TDC system to 95% of capacity. Third-Party Defendants are certainly correct that they must obey the Court's orders entered in the Ruiz case. however, Third-Party Defendants' duty to obey orders in the Ruiz case does not justify an exemption from their duty to not impose cruel and unusual punishment upon convicted felons they refuse to accept.

Although Third-Party Defendants have attempted to convince this Court that it is impossible to comply with applicable Ruiz orders while at the same time accepting delivery of the convicted felons presently incarcerated in the Harris County jails, such a conflict does not exist in reality. The applicable population capacity order in Ruiz simply requires that the overall inmate population within the TDC system not exceed 95% of design capacity. The stipulation does not require TDC officials to refuse to accept the delivery of newly-convinced felons. An infinite variety of politically unpopular solutions exist which would allow Third-Party Defendants to maintain their goal of 95% capacity while, at the same time, accepting all convicted felons from the Harris County jails.[9]

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[9]For example, Third-Party Defendants could have begun their now-ambitious prison building campaign earlier and with more vigor, they could immediately enter into contracts with other suitable facilities to provide space for the felons, or, most unpopular of all, they could make significant use of the Texas Prison Management Act, Tex. Rev. Civ. Stat' Ann. art. 6184o (Vernon Supp. 1989), which allows the early release of inmates under certain conditions.

D. This Court should abstain from exercising jurisdiction over the claims made against Third-Party Defendants in deference to the resolution of unsettled questions of state law in County of Nueces v. Texas Department of Corrections, No. 452,071 (250th Judicial District Court of Travis County, Texas).

This Court recognizes its duty to abstain from exercising jurisdiction over a case where a state court determination of an ambiguous state statute would render the determination of a federal constitutional issue unnecessary. Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941). Third-Party Defendants argue that this Court should abstain from exercising jurisdiction in this case because a state district court is presently considering TDC's duty to "speedily" accept convicted felons pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970). See, County of Nueces v. Texas Department of Corrections, No. 452-071 (250th Judicial District Court of Travis County, Texas).

However, abstention under the Pullman doctrine is only appropriate where "the issue of state law is uncertain." Reetz v. Bozanich, 397 U.S. 82, 86 (1970) (citing, Harman v. Forssenius, 380 U.S. 528 (1965)). The Court finds that Third-Party Defendants' state-law duty to accept convicted felons pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970) is not ambiguous at all. In fact, the state-court judge in the County of Nueces case recently held that TDC had a duty to accept all convicted felons as a matter of law.[10] The only remaining issue left to be decided in the County of Nueces case is whether it is possible for TDC to comply with this state-law duty in light of the orders entered by the Ruiz court. The question of TDC's ability to comply with its clear state-law duty to accept convicted felons from the county jails is not the kind of an ambiguous state-law issue that merits deference from this Court. This Court can determine whether Third-Party

[10]See, Exhibit A attached to Third-Party Defendants' supplemental memorandum in support of their motion to dismiss filed on March 27, 1989.

Defendants are capable of accepting additional convicted felons without impinging on any concerns of federalism or comity.

E. This Court should abstain from exercising jurisdiction over the claims made against Third-Party Defendants in deference to TDC's scheduled admissions policy.

Next, Third-Party Defendants argue that this Court should accord TDC's own scheduled admissions policy the same degree of deference as the United States Supreme Court gave the Texas Railroad Commission's regulations in Burford v. Sun Oil Co., 319 U.S. 315 (1943). Burford, however, provides no justification for abstention under the present circumstances. In Burford, the Supreme Court found that judicial review of the Railroad Commission's decisions in state court was expeditious and adequate. Burford, 319 U.S. at 333-334. In the present case, there is absolutely no meaningful review in the state courts of TDC's scheduled admissions policy. Thus, abstention would be inappropriate.

F. All counties in the State of Texas and all inmates allegedly backlogged in county jails should be joined as parties to this case.

Third-Party Defendants argue that all counties in the State of Texas and all inmates allegedly backlogged in county jails should be joined as parties to this case pursuant to Federal Rules of Civil Procedure 19, 20, 21, and 22. First, Third-Party Defendants argue that all Texas counties should be a party to this case because if this Court were to order TDC to accept additional convicted felons from Harris County, the remaining Texas counties would be prejudiced. Again, this argument improperly presumes that Third-Party Defendants cannot make effective use of the remedies described in footnote 9, above.

Second, Third-Party Defendants argue that the failure to join all other Texas counties and backlogged inmates would leave Third-Party Defendants subject to "multiple or inconsistent obligations." This argument is also faulty. The fact that Third-Party Defendants may be liable to more than one county does not render all counties necessary parties.[11] Finally, a judgment in this case could not give rise to the type of internal inconsistency that Rule 19 seeks to avoid. Accordingly, it is hereby

ORDERED that Third-Party Defendants' motion to dismiss, or, in the alternative, for joinder of all Texas counties and all inmates allegedly backlogged in Texas county jails is DENIED. It is further

ORDERED that Third-Party Defendants' motion to dismiss for lack of venue, or, in the alternative, to transfer venue is DENIED.

It is further

ORDERED that Third-Party Defendants' motion to stay proceedings pending an application to the Judicial Panel on Multidistrict Litigation is DENIED.

DONE in Houston, Texas, this 12th day of May, 1989.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

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[11] See, Cortez v. County of Los Angeles, 96 F.R.D. 427 (C.D. Cal. 1983) and cases cited therein holding that Rule 19 does not require the jonider of all plaintiffs advancing tort claims against the same defendant for injuries arising out of the same transaction or occurrence.

## APPENDIX Z

**Tex Gov't Code § 499.071. Allocation formula (Formerly Art. 6166a-4 (a) - (b).)**

(a) The Texas Board of Criminal Justice shall develop, adopt, and enforce an allocation formula that fairly and equitably allocates to each county or group of counties served by a community corrections and supervision department the number of institutional division admissions allocated to the county or counties until sufficient capacity is available in the institutional division. In devising the formula, the board shall consider relevant factors for each county or group of counties served by a department and shall assign weights to those factors as determined appropriate by the board. The factors shall include but are not limited to:

(1) the percentage of prison admissions for the entire state that were used by the county or counties in the preceding 12 months;

(2) the percentage of the state's violent index crime that occurred in the county or counties in the preceding 12 months;

(3) the percentage of the state's total index crime that occurred in the county or counties in the preceding 12 months;

(4) the percentage of the state's total arrests under the Texas Controlled Substances Act (Article 4476-15, Vernon's Texas Civil Statutes) that occurred in the county or counties in the preceding 12 months;

(5) the percentage of the state's population residing in the county or counties; and

(6) the percentage of the state's total unemployment in the county or counties.

(7) the percentage of all defendants serving sentences for felonies who are paroled from the institutional division, a jail in this state, a federal correctional institution, or a jail or correctional institution in another state in the preceding

12 months and who were released to reside in the county or counties.

(b) If the board is unable to obtain for a factor listed in Subsection (a) information for the preceding 12-month period, the board shall consider the most recent information available for that factor.

(c) The board shall revise the formula annually.

## APPENDIX AA

37 TAC Ch. 152 (in pertinent part):

§ 152.1. Purpose. Texas Civil Statutes, Article 6166a-4, requires the board to adopt and enforce an allocation formula to fairly and equitably allocate to each county the Available Institutional Division admissions until sufficient capacity is available in the Institutional Division to accept all prisoners eligible for transfer to the Institutional Division. An annual determination by the board that there is insufficient capacity in the Institutional Division to accept all prisoners from Texas county jails who are eligible for transfer into the Institutional Division as soon as they become eligible, shall make it necessary to adopt and enforce such a formula.

§ 152.2. Definitions and Exceptions.

(a) The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Available institutional division admissions - The total number of beds available within the Institutional Division for intake of prisoners is based upon the estimated rate of release of prisoners from the Institutional Division, minus .03333 of those beds which is adequate to allow the Institutional Division to expeditiously receive from

the counties any new prisoners who are sentenced to death, or who are recaptured escapees, pre-parole violators, Institutional Division prisoners returning from federal bench warrants, interstate corrections compact transfers, and out-of-state parole violators. Therefore, the number of admissions available is based upon an estimated rate of prisoner flow through the Institutional Division to maintain the Institutional Division capacity.

(2) Institutional division capacity - The total number of beds available for use within the Institutional Division in accordance with the limitations on capacity and its use imposed by federal court orders in *Ruiz v. Lynaugh*, Number H-78-987 (Southern District Texas, Houston Division.) Available institutional capacity at the time of the adoption of this section will be no more than 43,951. When the Lewis unit is populated and in operation, available Institutional Division capacity will be no more than 49,681.

(b) The Institutional Division may suspend or cancel admissions when the acceptance or transport of prisoners would be unsafe, such as in cases of extremely severe weather or civil disturbance, or would cause non-compliance with federal court orders. The Institutional Division is not required to make up for admissions so suspended or canceled. On days that the Institutional

Division is closed due to holidays, the number of admissions is decreased by the number of days of closure multiplied by the current number of daily admissions. The balance of admissions for the weeks is prorated out to the counties based upon their allocated percentage of intake.